Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

CITY OF YONKERS,

Petitioner,

v.

UNITED STATES AND YONKERS BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court-ordered housing remedy designed to further racial balancing of neighborhoods by requiring moves by families to opposite race-neighborhoods is a permissible remedy.

2. Whether a court-ordered housing discrimination remedy that requires a public entity to effectively exclude nonminority families from a subsidized housing program and to prefer minority families that are not identified victims of discrimination is narrowly tailored under strict scrutiny requirements.

3. Whether an appeals court may defer to the district court's equitable discretion in assessing the need for race-based relief under the narrow tailoring obligations of strict scrutiny.

PARTIES TO THE PROCEEDINGS

I. Active in this aspect of the litigation:

United States

Yonkers Branch, National Association for the Advancement of Colored People

City of Yonkers

II. Not active in this aspect of the litigation:

Yonkers Board of Education

Yonkers Community Development Agency

State of New York, its Governor, and various other state officials

U.S. Department of Housing and Urban Development

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Petitioner City of Yonkers, a New York municipal corporation, respectfully prays that the Supreme Court of the United States grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit (Judges Kearse, Calabresi and Sotomayor) entered on January 5, 2001 in appeal number 00-6022. Pet. App. 1a. That order upheld an unreported order entered by U.S. District Judge Leonard B. Sand (S.D.N.Y.) entitled Third Supplemental Long Term Plan Order ("TSLTPO"), dated December 29, 1999. Pet. App. 23a. The TSLTPO follows a series of remedial orders in the longstanding *United States v. Yonkers* housing desegregation litigation. The City of Yonkers contends the TSLTPO's race-conscious modification of those prior remedial orders fails to meet the requirements of constitutional strict scrutiny.

OPINIONS BELOW

The decision of the Second Circuit is reported as *United States v. Secretary of Housing and Urban Development*, 239 F.3d 211 (2d Cir. 2001) and is reprinted at Pet. App. 1a-22a. The district court's Third Supplemental Long Term Plan Order is not reported, but is reprinted in the Appendix to this petition at Pet. App. 23a-31a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Second Circuit issued its decision affirming the district court's order on January 5, 2001. No petition for rehearing was filed. This Court has jurisdiction to consider this petition pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL PROVISIONS

The City of Yonkers challenges the district court's order as violating the equal protection requirements of the Fifth and Fourteenth Amendments to the United States Constitution. *See* Pet. App. 422a.

STATEMENT OF THE CASE

In 1986, the district court entered its Housing Remedy Order outlining the responsibilities of the City of Yonkers, New York to remedy its violation of federal law in confining public and subsidized housing to the southwest portion of Yonkers. After many years of disputes and no progress by court-controlled agents toward a remedy, in 1996 the United States District Court for the Southern District of New York entered an order on consent that embodied the final plan for the subsidized housing remedy. Through the 1996 order, the City of Yonkers accepted responsibility to facilitate hundreds of units of affordable housing through the use of existing housing and new construction for qualified families on a race-neutral basis. Two years into the program, Yonkers had completed some 170 units of integrative, subsidized existing housing transactions. Some 70% of the families that obtained housing through the program were black or Hispanic.

But, the plaintiffs and the district court were dissatisfied because some of the housing beneficiaries were white. The district court, *sua sponte*, modified the 1996 order to require the City to use race in facilitating housing opportunities for qualified families. The Second Circuit Court of Appeals upheld the racial remedy finding it was narrowly tailored to further a compelling governmental purpose. Yonkers seeks review by this Court, claiming the modification fails to meet the strict scrutiny standards of constitutional equal protection. A court order that requires a defendant to subsidize moves by minority families to opposite-race neighborhoods is not a permissible remedy for past discrimination; rather, it is a program of outright racial balancing.

A. Course of Proceedings In The District Court.

In 1980, the United States and the Yonkers Branch of the NAACP filed complaints alleging that the City of Yonkers had unconstitutionally segregated subsidized housing as well

as the public schools of the City of Yonkers.[1] In 1985, the district court concluded that public and subsidized housing in the City of Yonkers was intentionally segregated by race. *United States v. Yonkers Board of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985). The 1985 liability decision found that the City had segregated housing patterns by concentrating all public and subsidized housing in southwest Yonkers and by refusing to approve subsidized housing outside that area due to the expected race of the occupants. On May 28, 1986, the district court entered the Housing Remedy Order ("HRO"), 635 F. Supp. 1577 (S.D.N.Y. 1986); Pet. App. 96a. Section VI of the HRO required the City to develop a plan for the creation of additional subsidized housing in east and northwest Yonkers.[2] Pet. App. 110a-112a. The Second Circuit Court of Appeals for the Second Circuit affirmed the liability

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1. School segregation claims were also made against the Yonkers Board of Education. The school desegregation portion of this litigation is not implicated by the matters raised in this petition.

2. In 1986 the district court conducted a six-day evidentiary hearing on the nature and scope of the housing remedy. The proposed remedies as well as the experts were clear that race should not be a criteria for occupancy of the remedial housing. Rather, the United States and NAACP sought a remedial order designed to create housing for low and moderate income families in currently white neighborhoods of east Yonkers. Pet. App. 58a-95a. The expert witness tendered by the United States proposed that the remedy be designed to provide affordable housing in parts of Yonkers that are not currently areas of minority concentration. Pet. App. 34a-37a. He explained that there was a substantially higher representation of black families among lower income groups in Yonkers, Pet. App. 39a-42a, therefore, he advocated a remedy that was designed to attract families based on their economic status. Pet. App. 42a-44a. The expert for the United States advocated "affirmative marketing" as a tool to encourage minority families to apply for affordable housing and agreed that some housing would be provided to white families. Pet. App. 45a-54a. The government's expert was clear that race should not be a criteria for occupancy of the remedial housing. Pet. App. 53a-55a.

findings and entry of the HRO. *United States v. Yonkers Board of Ed.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

On January 28, 1988, the district court entered a consent decree that established a long term goal of 800 units of subsidized housing to comply with section VI of the HRO. Pet. App. 119a. On June 13, 1988 the district court entered the Long Term Plan Order ("LTPO"). Pet. App. 133a.[3] The LTPO required the City to adopt an Affordable Housing Ordinance ("AHO") and set forth a private-developer driven plan to construct affordable housing in those areas from which subsidized housing had been unlawfully excluded. With the expectation of encouraging private developers to construct new units of affordable housing, rather than through municipally-sponsored projects, the LTPO and AHO used a combination of mandated incentives (such as zoning relief and tax abatements) and a requirement that at least 20% of all newly constructed multi-family units in Yonkers be made available as affordable housing. The LTPO also created the Fair Housing Implementation Office ("FHIO"), an independent agency responsible to the district court, which was charged with responsibility to implement the remedy. Pet. App. 148a-149a.

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3. These orders were explained in greater detail in this Court's decision in *Spallone v. United States*, 493 U.S. 265, 268-71 (1990) (addressing the City Council's 1988 contempt of district court's orders). As the Court of Appeals noted, in 1988 the City of Yonkers went through a difficult period of municipal opposition to compliance with the housing orders that culminated in a well-publicized contempt order. That order had the potential to bankrupt the City and, following this Court's denial of a stay, the City complied with the order. *See Spallone*, 493 U.S. at 273, 277. No elected official from the 1988 era holds a City office today. At no time since 1988 has the district court found the City or any of its officials in contempt of its orders. Any notion that the opposition of 1988 has continued into recent years simply has no basis in truth.

Nothing in the LTPO required or permitted the occupancy of remedial housing on the basis of race. The LTPO provided that occupancy priority for remedial housing should be provided to:

> 1) persons who, between January 1, 1971 and the date assisted housing pursuant to this Decree is made available, have been residents of public or subsidized housing in the City of Yonkers. Such persons shall be given the first opportunity to apply for such housing, which opportunity shall be afforded up until thirty (30) days following the date the final assisted housing units pursuant to this Decree are made available. Occupancy choice from among such persons applying shall be on a first-come, first-served basis;
>
> 2) residents of the City of Yonkers; and
>
> 3) persons employed in the City of Yonkers.

Pet. App. 140a. These priority groups have come to be known in this litigation as Priority 1, Priority 2, and Priority 3, respectively.

Conditions in the housing market changed, and with the general downturn in real estate, private developers proved reluctant to enter the assisted housing market. By late 1990 it became clear to the parties and the district court that modifications to the LTPO were needed if any results were to be obtained. In 1992 the City developed a proposal for modifying the LTPO that required the City to provide some 709 affordable housing units over a four-year period. On April 14, 1992, the City, United States and NAACP reached an agreement that the City plan was the basis for an acceptable modification of the LTPO. Based on that agreement, the Yonkers City Council adopted the resolution approving the City plan. The resolution marked the end of

an era of City opposition to the housing orders and an indication of political will to resolve the housing dispute in Yonkers. On June 9, 1992, the City moved the district court to enter its proposed modified Long Term Plan Order.

Following a lengthy evidentiary hearing, the district court entered the Supplemental Long Term Plan Order Adopting Additional Remedial Measures on October 5, 1993. Pet. App. 154a. The order rejected the City's plan, set forth a framework for the construction of new housing on three sites as recommended by the court-controlled FHIO, established a schedule for the utilization of 250 existing housing units, and placed responsibility for implementing the remedy orders with FHIO and a Housing Special Master. *See id.* The Court of Appeals upheld entry of the 1993 order, including the delegation of implementation authority to the Special Master, as within the district court's equitable discretion. *United States v. Yonkers Board of Education*, 29 F.3d 40 (2d Cir. 1994), *cert. denied*, 515 U.S. 1157 (1995).

Pursuant to the 1988 and 1993 orders, the City had little control over the implementation of the housing orders. Under the court-created FHIO, and later under the control of the Housing Special Master, the years 1988 through 1995 did not yield significant progress in the production of new housing. In February 1996, the district court met with newly-elected Yonkers Mayor John Spencer to discuss the prospect of breaking the logjam in completing the housing remedy. The Mayor sought a return of control over the remedy to the City. Following that meeting, the litigation parties embarked on a lengthy negotiation that culminated in the entry by consent of the Second Supplemental Long Term Plan Order ("SSLTPO") on November 6, 1996. Pet. App. 170a-173a; 177a. The SSLTPO provided a number of revisions to the remedy orders designed to complete the City's obligation to provide a remedy for housing discrimination. First, the order required the City to facilitate construction of mixed-income

housing on the three sites designated by the district court in the 1993 SLTPO and at a fourth site to be named by the City. Pet. App. 178a-180a. Second, the order required the City to facilitate 100 units of affordable housing per year for six years through "existing housing and/or new construction." Pet. App. 179a. Third, the order dissolved the court-controlled Fair Housing Implementation Office, reduced the Housing Special Master's role to that of a monitor, and required the City to create its own Yonkers Affordable Housing Department within City government as the agency responsible for implementation of the housing remedy. Pet. App. 182a-183a. Finally, the order provided that upon attainment of the obligations set forth in the order, the City will have completed all of its obligations under the various housing remedy orders. Pet. App. 179a, 186a.

During the period following entry of the SSLTPO, the City aggressively began implementation of the housing remedy through its new Affordable Housing Department. The City's housing office took applications and qualified families for assistance under the income and priority guidelines of the orders, assisted families in locating suitable housing for purchase in east and northwest Yonkers, and then provided a down payment/mortgage assistance subsidy of up to $40,000 to assist the family in purchasing a home. The litigation counsel met approximately once a month with the court's monitor and the City's Affordable Housing Department employees, reviewed the City's progress and sought to resolve differences over implementation issues.

The City began an outreach program that aggressively solicited applicants in need of affordable housing. In order to ensure that families in Priority 1 (former or current residents of Yonkers public or subsidized housing) were reached, in late 1998 the City conducted a special outreach to some 1500 Priority 1 households. Lodging App. 2, pp. 1-2. The outreach garnered 183 new applications from Priority 1 families. A-1177-85.

The City administered the program on a race-neutral basis. In the first two years of the program, the City assisted over 170 families in purchasing or renting affordable housing. Over 70% of those families were African-American or Hispanic. Lodging App. 2, Section III.

Following the first year of implementation, the parties agreed that the City would receive 81.5 credits against the annual 100 unit per year goal of ¶ 2 of the SSLTPO. A-1828. At the end of the second year of implementation, the City tendered a report seeking 89.5 credits toward its annual goal. Lodging App. 2, Section III, p. 7. The district court held a hearing on February 24, 1999 to address the plaintiffs' objections to the City's second year compliance report. Pet. App. 189a. The NAACP objected to the provision of housing opportunities for nonminority families that had otherwise met the requirements of the program. Pet. App. 195a-196a. Objecting to the City's claim that the program was intended to use race-neutral means by the creation of affordable housing outside southwest Yonkers to achieve desegregation, the NAACP claimed "the purpose was to foster integration through providing for minority households to make desegregative moves." Pet. App. 196a. On that basis, the NAACP, with veiled support from the United States, objected to providing credit against the City's annual goal for transactions involving nonminority applicants that purchased affordable housing in the target neighborhoods. The NAACP also claimed the City was not serving enough Priority 1 families. The City asserted that it was serving all interested Priority 1 families as well as Priority 2 or 3 families on a race-neutral basis. Pet. App. 214a-234a. The City contended that the priorities of the LTPO were stated in race-neutral terms and that the City was fostering desegregation through its race-neutral, economically-driven housing program. Pet. App. 215a-217a. The district court directed that consideration be given to the "submission to the Court of a proposed revision to the remedy

order designed to increase the ability of the priority 1 class members to have greater housing opportunity" and the parties "more carefully define what is meant by furthering the integrative purposes of the order." Pet. App. 217a-218a, 223a.

On June 1, 1999, on the recommendation of its monitor, the district court entered an order that partially approved the City's Year 2 credit report and directed the City to develop plans to enhance its outreach efforts to Priority 1 applicants and provide rental opportunities. Pet. App. 234a-237a. Finally, the order limited the City to servicing only Priority 1 families and those few Priority 2 and 3 families that had already received a commitment for housing assistance from the City. Pet. App. 237a.

On June 21, 1999, the parties made written submissions concerning pending housing issues before the district court. The NAACP and United States urged the court to reject full credit for white families that received housing benefits under the City's program. Pet. App. 290a-299a. No motions for modification were filed. The City outlined the race-neutral requirements of the remedy orders and demonstrated that the contested credits were plainly within the letter and purpose of the orders. Pet. App. 251a-279a. The City demonstrated that in the first two years of its program over 70% of the beneficiaries of the program were minority families. Lodging App. 2, Section III. Finally, the City argued that the standards for modification of the earlier orders had not been met and that a race-based remedy was not justified under standards of constitutional strict scrutiny. Pet. App. 277a-279a.

The City submitted its proposed Priority 1 outreach and rental programs in compliance with the June 1, 1999 Order. Pet. App. 300a-316a. These programs were further discussed in the monitoring process, and ultimately were recommended by the monitor to the Court. Pet. App. 329a-340a. The NAACP objected to the monitor's recommendation

that these program revisions were sufficient to further the purposes of the remedy orders. Pet. App. 341a-346a.

On August 11, 1999, the monitor transmitted to the parties "Judge Sand's Tentative Conclusions" in response to the monitor's report. Pet. App. 350a-356a. The report accepted the monitor's recommendation and did not impose racial criteria for the selection of housing beneficiaries. *Id.*

Following further objection by the NAACP, Pet. App. 357a-361a; 368a-371a, the district court held a non-evidentiary hearing on September 9, 1999. Pet. App. 372a. The NAACP proposed that all credited housing transactions must involve minority families moving to non-minority areas of Yonkers. Pet. App. 384a-385a. The City opposed such race-based treatment of housing applicants, explaining that under the orders developed since 1986 the remedial housing program was expected to foster "racially integrative housing opportunities through the provision of a pool of affordable housing in the areas that were previously excluded from affordable housing opportunities." Pet. App. 390a-392a. The NAACP, in response, urged the district court to require race-consciousness in the administration of the City's program. Pet. App. 395a.

On December 29, 1999, the district court entered the Third Supplemental Long Term Plan Order ("TSLTPO"). Pet. App. 23a-31a. In relevant part, paragraph 5 of the order modified the occupancy priorities for housing beneficiaries as stated in the 1988 LTPO to provide:

> Toward that end, the Court further orders that future full credits will only be allowed and AHTF funds may only be used for the creation of affordable housing opportunities as follows:
>
> a) For Priority 1 households who move to census blocks in East and Northwest Yonkers which as of 1990 had a Black

> and Hispanic population which together totaled less than 45%;
>
> b) For minority Priority 2 and 3 households who move to census blocks in East and Northwest Yonkers which as of 1990 had a Black and Hispanic population of less than 45%;
>
> c) For non-minority Priority 2 and 3 households who move to census blocks in East and Northwest Yonkers which as of 1990 had a White population of less than 45% . . .

Pet. App. 27a-28a.[4] Based on this order, the City was required to continue serving Priority 1 families, most of whom are minority, by requiring that they buy or rent housing located in predominantly nonminority neighborhoods. The order requires that Priority 2 or 3 families must move to an opposite-race neighborhood. Minority families may choose housing almost anywhere outside southwest Yonkers, in 1,419 census blocks with predominantly nonminority populations, while nonminority families are limited to housing located in the 28 census blocks with predominantly minority populations. The City's housing program was transformed from one that provides for the creation of affordable housing in all parts of Yonkers to one that requires families to move to neighborhoods of a different race. On appeal, the City contested the race-based classification of Priority 2 and 3 families.

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4. The district court entered a further order on January 24, 2000 modifying paragraph 5 of the TSLTPO providing that its provisions apply only to existing housing transactions, but not to new construction opportunities. Pet. App. 32a-33a.

B. The Second Circuit's Decision.

The Court of Appeals upheld the race-based requirements of the district court's order. Finding that the City had defied the district court in 1988, Pet. App. at 5a, the appeals court held the City of Yonkers responsible for failures of the district court's Special Master and housing office to provide housing during the years from the late 1980's until the district court returned control of the housing remedy to Yonkers on entry of the 1996 SSLTPO. *Id.*, 6a. The appeals court acknowledged that the TSLTPO constituted a modification of the 1996 SSLTPO; but found that it met the standards for modification of *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). Pet. App. 13a-15a. The appeals court cited the district court's finding that the number of Priority 1 families assisted by the program was inadequate — although a standard of adequacy has never been set. *Id.*, 13a. Although the district court's prior orders only required the provision of affordable housing opportunities outside southwest Yonkers, the appeals court favorably recited the district court's finding that "[a]chieving the remedy's *integrative* goals depends not simply on providing subsidized housing to minority families but rather on locating minority housing outside of predominantly minority neighborhoods or locating white housing outside of predominantly white neighborhoods." *Id.*, 13a n.8 (emphasis in original). The appeals court rejected the City's undisputed assertion that over 70% of the families assisted by the program were minority (black or Hispanic) claiming that — although not a part of any prior order — the City should have *required* families to move to neighborhoods of the opposite race in order to further racial integration. *Id.*, 14a-15a. On that basis, the appeals court found that the 1996

> SSLTPO "prove[d] to be unworkable because of unforseen obstacles" — specifically the continued failure of the City to serve priority one households

> and to promote integrative housing moves — and that continued "enforcement of the [SSLTPO] without modification would be detrimental to the public interest" — the achievement of the goals of serving priority one households and desegregating Yonkers public housing.

Id., 15a (quoting from *Rufo*, 502 U.S. at 384).

The appeals court also acknowledged that the TSLTPO adopts a racial classification, but found that it met the standards of strict scrutiny analysis. *Id.*, 16a. The court summarily found the existence of a compelling governmental interest. Relying on the district court's 1985 liability decision, the Court of Appeals stated that "[t]he district court expressly found that the City has engaged in intentional racial discrimination in its subsidized housing program . . ." *Id.*, 17a.

With respect to the narrow tailoring prong of strict scrutiny analysis, the appeals panel found that the race-conscious remedy met the four-part test set forth in the plurality decision in *United States v. Paradise*, 480 U.S. 149, 171 (1987). Pet. App. 19a. Although the district court failed to make any findings to support its adoption of a racial remedy, the appeals court made its own limited findings in upholding the racial classification. First, the court found that the race-based relief was necessary because it was within the district court's equitable discretion. Pet. App. 17a-18a. Without deciding whether it was necessary to consider any less restrictive alternatives, the court found that "because of the active and passive resistence to integration displayed by the City" and the district court's statement that "the experience has not been satisfactory," the first *Paradise* factor was met. *Id.*, 18a. Second, the appeals court found the racial remedy " 'flexible' and 'ephemeral' " because the district court "will adjust the terms of the Order as needed."

Id., 18a-19a. Third, the appeals court upheld the racial classification that effectively excluded Priority 2 and 3 white families from the program as "not disproportionate to their racial mix or the size of the Yonkers housing market." It was "reasonably-paced (100 credits per year) . . ." And, the appeals court was loath to "second-guess the [District Court's] carefully considered choice of the figure[s] necessary to achieve its many purposes . . ." *Id.* at 19a. Finally, the Court of Appeals rejected the City's contention that the racial classification unfairly burdened the rights of nonminority families, because they were able to participate in the program if they moved to a predominantly minority neighborhood of east or northwest Yonkers and the order would "reduc[e] the number of new white applicants who would receive housing and not expel[ ] any white families from housing they already inhabit." *Id.* at 20a.

REASONS FOR GRANTING THE WRIT

I. Strict Scrutiny Requires A Thorough And Complete Analysis Of The Justification And Construction Of A Race Conscious Remedy To Ensure It Is Employed Only As A Last Resort.

Petitioner City of Yonkers ("City") seeks review of the decision of the United States Court of Appeals for the Second Circuit upholding a district court's order that, without findings to justify a race-based remedy, requires the City to administer its remedial affordable housing program on the basis of race. The district court's order requires the City to exclude nonminority families from participating in affordable housing opportunities in most parts of Yonkers and to prefer black and Hispanic families for the purpose of achieving a racial balance in predominantly nonminority neighborhoods. The district court's race-based remedy is not narrowly tailored to further a compelling governmental interest.

In upholding the race-based remedy, the Second Circuit summarily reviewed the four factors identified in the plurality

decision in *United States v. Paradise*, 480 U.S. 149, 171 (1987), and found that those factors were met. Pet. App. 17a-21a. In its review of those factors, however, the Court of Appeals deferred to the district court's exercise of its "sound discretion" and was loath to "second guess the [District Court's] carefully considered choice of the figure[s] necessary to achieve its many purposes . . ." *Id.*, 18a-19a. The Second Circuit's decision does not represent the level of strict and searching scrutiny required by the decisions of this Court and some of the other circuits. Review by this Court is warranted to further define how strict scrutiny should be applied in assessing whether a racial remedy sufficiently "fits" the identified compelling interest.

A. The *Paradise* Factors Alone Are Not Sufficient To Assess Whether A Racial Remedy Is Narrowly Tailored.

This Court has conclusively determined that "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995). In reviewing racial classifications under the strict scrutiny test, most of this Court's recent decisions have focused on the first prong of strict scrutiny analysis — whether a compelling governmental interest that justifies racial-based action is present. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 279 (1986) (plurality joined in part IV). This Court has acknowledged that it has "not always provided precise guidance on how closely the means (the racial classification) must serve the end (the justification or compelling interest), . . ." *Shaw v. Hunt*, 517 U.S. 899, 915 (1995).

Many lower courts have followed the four-part test endorsed by a plurality of this Court in *United States v. Paradise*, 480 U.S. 149, 171 (1987) ("we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including

the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties").[5] While the *Paradise* factors may be helpful in evaluating some race-based relief,[6] they do not address the *extent* to which a racial remedy must be tailored to survive strict scrutiny. Justice Powell recognized this concern in *Wygant*, noting that "our decisions always have employed a more stringent standard — however articulated — to test the validity of the means chosen by a State to accomplish its race-conscious purposes." 476 U.S. at 279. *See also, id.* at n.6 (" 'particularly intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense' ").

The Second Circuit's decision recited the *Paradise* factors, but in applying them deferred to the district court's exercise of equitable discretion.[7] Rather, the Court of Appeals recognized

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5. The *Paradise* factors were first outlined in Justice Powell's concurrence in *Fullilove v. Klutznik*, 448 U.S. 448, 510-11 (1980) (Powell, J., concurring). Justice Powell assembled the original four factors from a series of Courts of Appeals decisions. *Id.* Although they have subsequently been cited by a number of the Courts of Appeals as controlling, a majority of this Court has never clearly adopted the *Paradise* factors for evaluation of whether a classification is narrowly tailored.

6. Not all Courts of Appeals have uniformly employed the *Paradise* factors. The Fourth Circuit distinguished between the *Paradise* factors and those recognized by this Court in *Croson* to assess whether a racial classification is narrowly tailored. *Podberesky v. Kirwan*, 38 F.3d 147, 158 n.10 (4th Cir. 1994). *See also Boston Superior Officers Federation v. City of Boston*, 147 F.3d 13, 23 (1st Cir. 1998) (employing a unique set of factors to assess narrow tailoring).

7. While the appeals court's level of scrutiny was superficial at best, the district court made no findings to support entry of a racial classification other than a stray comment that ". . . the experience has not been satisfactory." Pet. App. 18a.

the "sound discretion of the trial court" that generally applies when a district court fashions an equitable remedy that is not subject to heightened scrutiny. Pet. App. 18a. The lower courts failed to meaningfully apply the intense level of scrutiny necessary to ensure that the "classification at issue 'fit[s]' with greater precision than any alternative means." *Wygant*, 476 U.S. at 279, n.6. The City contends that further guidance by this Court explaining how a lower court should strictly scrutinize a racial remedy is warranted.

Contrary to the Second Circuit's finding that the assessment of the necessity for racial relief is a matter left to the "sound discretion" of the district court, Pet. App. 18a, other Courts of Appeals have adopted a much stricter standard. The Fourth Circuit has held that "[t]he essence of the 'narrow tailored' inquiry is the notion that explicitly racial preferences . . . must only be a 'last resort' option." *Hayes v. North State Law Enforcement Association*, 10 F.3d 207, 217 (4th Cir. 1993). The Eleventh Circuit wrote that "[i]f a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Engineering Contractors Association v. Metro Dade County*, 122 F.3d 895, 927 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998). Such remedies should only be a "last resort." *Id.* at 929. *See also Alexander v. Estepp*, 95 F.3d 312 (4th Cir. 1996), *cert. denied*, 520 U.S. 1165 (1997) (follows "last resort" standard). The Fifth Circuit has required that "a race conscious remedy must be framed to address the exact effects and harms of the discrimination at issue." *Walker v. City of Mesquite, Texas*, 169 F.3d 973, 982 (5th Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000). The Fifth Circuit noted the need for an "exact fit" between harm and remedy. *Id.* "Where . . . the defendants have begun making race-neutral, good faith, and effective efforts to remedy the wrongs of the part, a race-conscious remedy should only be a last resort." *Id.* at 986.

Neither the Second Circuit nor the district court engaged in an intense level of scrutiny designed to ensure that the racial

remedy was being employed only as a "last resort" and that nothing less than the effective exclusion of nonminority families from the program was necessary to cure the effects of past discrimination. Rather, the Second Circuit, employing the broader standards of school desegregation cases, Pet. App. 21a, substantially deferred to the district court's unexplained decision that a race-based remedy was necessary. Such a policy of "deference" was also followed by the First Circuit in *Mackin v. City of Boston*, 969 F.2d 1273, 1277-78 (1st Cir. 1992) ("a significant measure of deference is owed to the trial court's conclusion that a particular kind of relief is essential to heal a constitutional wound"). Such deference in assessing the first *Paradise* factor, necessity for the relief, has no support in the decisions of this Court which require strict and searching examination in assessing the legality of a racial remedy. *See Adarand Constructors v. Pena*, 515 U.S. 200, 224 (1995) ("precisely tailored"); *id.* at 236 ("detailed examination, both as to ends and as to means").

The Second Circuit's rote incantation of the *Paradise* factors does not constitute a sufficient inquiry of whether the racial classification of housing beneficiaries is necessary as a "last resort," to remedying past discrimination. This Court did not employ the *Paradise* factors in rejecting the remedy in *Croson*. *See Croson*, 488 U.S. at 507. Determination that a racial remedy exactly fits the condition to be remedied is necessary to ensure that a program of "racial balancing" is not approved under the guise of remedying past discrimination. *Id.* Here, Priority 2 and 3 minority families gain the benefits of an affordable housing program solely for the purpose of relocating more minority families to certain neighborhoods of Yonkers. Such a program is designed to further racial balancing, which should never be deemed necessary to cure the effects of past discrimination. *Croson*, 488 U.S. at 507 ("quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing").

Review by this Court is necessary to further explain how a race-conscious remedy must precisely fit the condition to be

remedied. Justice Powell's discussion of the meaning of the term "narrowly tailored" in *Wygant*, 476 U.S. 267, 279 n.6 and 7 (1986) (plurality), recognized that the term is capable of varying interpretations. But, Justice Powell recognized, "the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used." *Id.* at n.6. As discussed above, that approach has carried over into the decisions of several of the Courts of Appeals. It conveys the message that racial remedies are reserved only for the most egregious situations where nothing else will serve the desired end. The *Paradise* factors, however, lack specificity about the level of scrutiny required.[8] While the Second Circuit's decision assumed, without deciding, that a race-based order is "permissible only where no less restrict[ive] alternative is available," Pet. App. 18a, the discussion failed to fairly address how the order at issue in this case is the least restrictive alternative or, in the words of the Fourth Circuit, the "last resort." Nothing in the Second Circuit's review comes close to addressing how the remedy precisely fits the underlying purpose and is employed only as a last resort. Such a deviation from acceptable standards of strict scrutiny warrants review by this Court.

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8. In a memorandum to the general counsels of federal agencies following this Court's decision in *Adarand*, dated June 28, 1995, the Assistant Attorney General, Office of Legal Counsel evaluated the application of strict scrutiny to federal programs. He advised that "it is probably not the case that an affirmative action program has to satisfy every [*Paradise*] factor." Dellinger memorandum, at 19. With respect to the "fit", Mr. Dellinger advised that "the government may not be obliged to consider race-neutral alternatives every time that it adopts a race-conscious measure . . ." *Id.* at 21. Again, on February 29, 1996, Associate Attorney General John R. Schmidt advised federal agencies that "even under strict scrutiny, congressionally authorized affirmative action measures undertaken by federal agencies are entitled to particular deference from the courts . . ." Schmidt memorandum, at 2. Such advice to federal agencies demonstrates why further guidance from this Court to ensure that racial remedies are employed only as a last resort is absolutely critical if such remedies are to be permitted at all.

B. Federal Courts Should Make Detailed Findings To Meet the Searching Inquiry Required To Justify A Race-Based Remedy.

At no time did the district court make any findings designed to justify the employment of the race-based remedy other than making the unexplained comment that the results of the City's past implementation effort have "not been satisfactory."[9] "If a District Court order that is imposed after no evident consideration of the available alternatives can survive strict scrutiny as narrowly tailored, the requirement that a racial classification be 'narrowly tailored' for a compelling governmental purpose has lost most of its meaning." *United States v. Paradise*, 480 U.S. 149, at 201 (1987) (O'Connor, J., dissenting). Nor did the Second Circuit make sufficient findings to justify a racial remedy. While it invoked the *Paradise* factors, its recitation of them was insufficient to justify the extreme remedy imposed by the district court's order. Rather, a district court must clearly and precisely address the basis for its assessment that race-based action is necessary. *See Wygant*, 476 U.S. at 277 ("trial court must make a factual determination . . ." to support race-based action).

The Second Circuit's decision not to *require* the district court to make findings is also in conflict with decisions of the Third and Eleventh Circuits. *See Schurr v. Resorts International Hotel*, 196 F.3d 486, 496 (3d Cir. 1999) ("courts of appeals should not decide the legality of an affirmative action program in the absence of careful district court analysis of the merits"); *In re Birmingham Reverse Discrimination Employment*

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9. The City strongly disputes that assessment, given its placement of some 170 families in affordable housing that met the locational requirements of the 1996 order over a two-year period. Moreover, using race-neutral efforts, the evidence was undisputed that some 70% of the beneficiaries were minority families. Given the years of failure by court-appointed agents to produce *any* housing, the City's efforts should have been applauded by the district court rather than savaged by the plaintiffs.

Litigation, 20 F.3d 1525, 1539-40 (11th Cir. 1994), *cert. denied*, 514 U.S. 1065 (1995) (district court findings of fact are "necessary" to appellate review, otherwise "appellate court has no basis to determine whether race-based action was justified as a remedy"). The Second Circuit's decision upholding a racial remedy when the trial court failed to make any findings to justify the remedy is contrary to the decisions of this Court as well as the Third and Eleventh Circuits which require a remand to the district court for entry of appropriate findings to justify a racial remedy.

Because the district court utterly failed to justify the need for the racial classification, the Second Circuit proceeded to patch together its own findings. Pet. App. 17a-21a. But, it is clear that the findings of the Court of Appeals are infected by a deference to the district court's judgment and lack the specificity needed to ensure that the remedy "fits" the violation with sufficient precision and has been employed only as a last resort.

The need for particularized findings is well demonstrated here, where the racial remedy was imposed some fourteen years after the district court made its original liability findings. While the City does not take issue with the settled determination that many years ago the City of Yonkers engaged in unlawful discrimination by confining subsidized housing to southwest Yonkers,[10] such a finding alone cannot justify the racial classification excluding nonminority families from the City's affordable housing program. The remedy that the district court imposed in 1986 provided for the creation of subsidized housing opportunities in those parts of Yonkers from which it had previously been excluded on a race-neutral basis. And, while there is no question Yonkers took several years to accept that reality, the district court correctly approved a 1996 consent order designed to return control of the housing remedy to the defendant City for implementation on a race-neutral basis. Pet. App. 170a-175a. At no time did the lower courts sufficiently identify the

10. *See Spallone v. United States*, 493 U.S. 265 (1990).

continuing effects of past discriminatory practices that necessitated the race-based relief employed here. Nor did the district court find the remedy necessary due to obstructive conduct by the City. For example, the district court did not find that minority families were disproportional underserved by the City's affordable housing program. Indeed, the City demonstrated that some 70% of the beneficiaries families were black or Hispanic. This was clearly not a case where the City was blocking minority families from the remedial program. Without sufficient identification of the underlying facts justifying a racial classification, there is nothing to tailor the racial relief to.

"[P]roper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects." *Croson*, 488 U.S. at 510. Here, the district court made no findings to define why the 1996 consent order required modification to impose a race-based remedy. Nor are the appeals court's de novo findings sufficient, given their generalized references only to the 1985 liability order and the period of resistance that followed in the late 1980s.[11] At no time did the lower courts find resistance or obstruction by the City following the entry of the 1996 consent order.

C. The District Court Should Have Made Findings To Justify Its Conversion Of The Program To One With A Goal Of Fostering Race-Based Moves.

As discussed above, the district court failed to make any findings to justify the race-based remedy it adopted. Such

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11. At no time has it been demonstrated how the unfortunate incidents of 1988, *see Spallone*, 493 U.S. at 272, justify the imposition of a racial quota in 1999. Unlike the situation in *Paradise*, 480 U.S. at 168-72, the district court has never found the remedy necessary due to the defendant's obstruction. Rather, in 1996 the district court returned control over the remedy to the City and Yonkers was making good progress toward completing its remedial obligations. The Second Circuit's references to the activities of the 1980s is far off the mark.

findings would have demonstrated that the racial remedy is not designed to further a permissible goal of a federal court in ameliorating the effects of past discrimination. Rather, it redirected the remedy to a goal of racial balancing.

In 1986, as a remedy for the City's discriminatory conduct in confining subsidized and public housing to southwest Yonkers, the district court ordered Yonkers to facilitate public and subsidized housing in other parts of Yonkers. Pet. App. 105a-112a. Such a remedy was reasonably tailored to the identified violation of federal law. The district court's 1999 order converted the goal of the remedy from the creation of affordable housing in neighborhoods from which it had been excluded, to one designed to achieve a racial balance in neighborhoods through "moves" of minority families to other-race neighborhoods.

Such a program of racial balancing is not a permissible constitutional goal for a housing remedy. Housing is largely a matter of individual choice. Hence, the district court's order conflicts with this Court's decision in *United States v. Fordice*, 505 U.S. 717 (1992). *Fordice* made clear that in dismantling a prior dual system that invokes elements of choice rather than assignment, the constitution demands the elimination of the "policies and practices traceable to its prior system that continue to have segregative effects . . ." 505 U.S. at 731. That is exactly what the original remedy was designed to do: it eliminated the City's prior policy of confining low income housing to a single neighborhood and affirmatively required expansion of the subsidized housing program to all parts of Yonkers.

The district court's order converts this remedy to one where families are "assigned" to neighborhoods on the basis of their race. "Residential housing choices, . . . , present an ever-changing pattern, one difficult to address through judicial remedies." *Freeman v. Pitts*, 503 U.S. 467, 495 (1992). A remedy that assigns families to neighborhoods on the basis of their race is unnecessary to rectify the effects of the past practices of the City that formed the basis of the original violation. Review by

this Court is warranted to correct this adoption of an assignment policy based on race.

II. The Racial Remedy Approved By The Lower Courts Is Not Narrowly Tailored To A Compelling Interest.

This Court's decisions have consistently required that a racial remedy be narrowly tailored to precisely fit a compelling governmental purpose. The Second Circuit's analysis demonstrates how the *Paradise* factors are too vague to provide sufficient guideposts in constructing a racial remedy. The Second Circuit failed to sufficiently identify those aspects of the original remedy that needed strengthening and then tailor the remedy to that condition. Instead, the remedy imposed by the district court simply required the City of Yonkers to effectively exclude nonminority families from the City's affordable housing plan. The original finding of discrimination is not a license to adopt a racial remedy. Moreover, such a complete exclusion of people from receiving a governmentally-provided benefit is not narrowly tailored to the goal of remedying past racial discrimination against residents of public and subsidized housing.[12] It is a program of outright racial balancing intended to achieve a racial mix in local neighborhoods. Review by this Court is warranted to provide direction to lower courts on the proper application of the narrow tailoring aspect of strict scrutiny.

A. The District Court Lacked Any Justification For Adoption Of A Racial Remedy.

In 1985, the district court found that the City violated federal law when it confined public and subsidized housing to southwest Yonkers. 624 F. Supp. 1276. As a remedy, the district court determined that the City should facilitate the creation of public and subsidized housing outside the southwest quadrant of Yonkers. While it was expected that the court-ordered housing

12. Since 1988, the LTPO has included a race neutral preference for persons who have resided in Yonkers subsidized housing that remains in place under the current orders.

would further racial integration, the original remedy orders did not provide for race-based selection of housing occupants. *See* Pet. App. 254a-256a.[13] The remedy was properly tailored to the original violation; the City was required to create subsidized housing in those parts of Yonkers from which the City had previously excluded such housing. While the evidence at the 1986 remedy hearing showed that such housing would have an integrative effect, Pet. App. 46a-47a, it was clearly anticipated that the housing would not be tenanted on the basis of race.[14] Pet. App. 53a-55a.

When the City took control of remedy implementation following entry of the 1996 consent order, it began implementing the remedy in a race-neutral manner, consistent with the extant orders as well as the Constitution. The City also instituted an aggressive outreach program intended to reach residents of subsidized housing and other lower income applicants. As a result of such race-neutral efforts, the City assisted over 170 families in purchasing or renting affordable housing; some 70% of those families were African-American or Hispanic. Lodging App. 2, Section III. The results were entirely consistent with the evidence developed at the 1986 remedy hearing as well as the original remedy order. The City's program provided a remedy that sufficiently fit the original violation.

The NAACP was dissatisfied because some affordable housing in predominantly white neighborhoods was being occupied by white applicants who otherwise met all of the race-neutral occupancy requirements of the court orders and some minority applicants were selecting housing in those few

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13. The 200 unit public housing component of the remedy was completed by 1994. The units were, and remain, tenanted on a race-neutral basis.

14. It was expected that the court-ordered housing would have an integrative effect because, as shown in the liability phase, minority representation is greater in lower-income families than in higher-income families. Pet. App. 39a-40a.

predominantly minority neighborhoods located outside southwest Yonkers. As a result, the district court modified the occupancy requirements directing the City to ensure that families only move to neighborhoods predominated by the opposite race. Minorities could choose housing almost anywhere outside southwest Yonkers, in 1,419 census blocks with predominantly nonminority populations, while nonminority families could select housing located in only 28 census blocks with predominantly minority populations — effectively excluding them from the program.

The district court converted the remedy from one designed to provide a remedy for the exclusion of subsidized housing from a neighborhood to one designed to achieve some unspecified racial balance in neighborhoods. Such an end is not tailored to the goal of remedying past discrimination and is transparently designed for the sole purpose of racial balancing. Such a goal is not narrowly tailored to any legitimate purpose. *Croson*, 488 U.S. at 507 (1989). Unlike the case in *Paradise*, 480 U.S. 149, where the State of Alabama was dragging its feet in providing *any* promotional opportunities for its black employees, the City of Yonkers was actively providing housing opportunities to many minority families through race-neutral means. Minority families were receiving a disproportionately large share of the benefits in comparison to their representation among local residents. The district court's order requiring 100% minority participation in the program yielded to the plaintiffs' agenda of racial balancing and is not narrowly tailored to any legitimate goal. *Id.*

The district court expressed concern that an insufficient number of Priority 1 families were receiving the benefits of the remedy.[15] But, the preference for minority Priority 2 or 3 families

15. Priority 1 consists of those families that have lived in public or subsidized housing in Yonkers at any time since 1971. Pet. App. 140a. That occupancy criteria, while stated in race-neutral terms, describes a group that overwhelmingly consists of minority families. (Cont'd)

does absolutely nothing to further the goal of providing a remedy for Priority 1 households. Hence, the remedy imposed does not satisfy the district court's desire to more precisely target the remedy to Priority 1 families.[16] *Podberesky v. Kirwan*, 38 F.3d 147, 158 (4th Cir. 1994) ("district court did not sufficiently connect the problems the [defendant] purports to remedy to the [racial classification]").

B. The Second Circuit's Review Fell Far Short Of A Strict And Searching Examination.

The Second Circuit's review consisted of a recitation of the *Paradise* factors and conclusive findings that they had been met. Such a review was hardly the sort of searching examination necessary to justify racial relief. *See Middleton v. Flint*, 92 F.3d 396, 409-13 (6th Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997) (reversing a district court's finding that plan was narrowly tailored by applying far greater scrutiny to the *Paradise* factors). The Second Circuit's cursory analysis demonstrates why further explanation of the *Paradise* factors by this Court is necessary to assist lower courts in assessing a racial remedy.

The Second Circuit never reviewed the original liability findings to assess the necessity for extreme racial relief. Rather, it summarily deferred to the district court's discretion and, without extended discussion, said race-neutral remedies were

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(Cont'd)

The district court characterized that group as the "hardcore victims of prior housing practices." Pet. App. 398a. Persons in Priority 2 or 3, regardless of their race, have no claim as victims of past discrimination.

16. The City has taken action to meet the district court's concern to assist Priority 1 families. It has conducted outreach to thousands of residents of public and subsidized housing seeking their participation in the program. It focused its attention on only assisting Priority 1 families during 2000. The City has raised subsidies per family and taken other steps designed to enhance participation in the remedy by the arguable victims of discrimination.

ineffectual. Pet. App. 18a. The Second Circuit's limited and deferential review demonstrates why strict and searching scrutiny is necessary. Rather than assessing the reasonability of the district court's decision that a racial classification was necessary, the lower court should have determined whether the remedy was the least intrusive possible, used only as a last resort and fitted the violation as precisely as possible. The lower court should have examined other non-racial or less intrusive racial remedies and explained why it rejected them. While the City contends its current efforts were sufficient to meet the goals of the 1986 Housing Remedy Order to provide integrative housing opportunities in those parts of Yonkers from which such housing had been excluded, other less onerous efforts to ensure nondiscriminatory housing practices should have been evaluated and possibly implemented. *See Raso v. Lago*, 135 F.3d 11, at 16, 17 (1st Cir. 1998), *cert. denied*, 525 U.S. 811 (1998) (rejecting claim that affirmative outreach policies to seek racial mix in subsidized housing creates a racial classification).

Nor was there any sufficient inquiry into the flexibility of the remedy. While the Second Circuit stated the obvious — that the "District Court will adjust the terms of the Order as needed" — that does nothing to ensure flexibility on the part of the City in its implementation of the remedy. The Order mandatorily excludes nonminority Priority 2 or 3 families from the program — a 100% quota — solely on the basis of their race. There is no "individualized procedure" or assessment of whether a family is a victim of past discrimination. The order simply furthers "administrative convenience" in achieving a racial balance. *See Croson*, 488 U.S. at 508; *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion).

The Second Circuit's treatment of the third factor, the relationship between the racial goal and the relevant market, ignores the requirement that the remedy be tailored to the scope of the discrimination. Often that issue may be assessed by statistical disparities in minority participation in the program at issue. *Hazelwood School District v. United States*, 433 U.S.

299, 307-08 (1977). There was no evidence here that minority families were being screened out of the program. On the contrary, minorities were receiving a disproportionately large 70% of the program's benefits — while the City used effective race-neutral procedures. Here, the lower courts approved the complete exclusion of nonminority families. "There is no more rigid quota than a 100% set-aside." *Metro Broadcasting v. FCC*, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting). A 100% quota bears no relationship to the representation of minority families seeking housing. *See Middleton v. City of Flint*, 92 F.3d 396, 412 (6th Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997) ("It seems obvious that a plan's tailoring is less 'narrow' if it results in a very large degree of preference for minority group members (and corresponding disadvantage for non-minority group members) than if the degree of preference is smaller"); *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, 1548 (11th Cir. 1994), *cert. denied*, 514 U.S. 1065 (1995) (rejecting "50% annual quota to establish a work force . . . reflecting black employment in lockstep proportion to the proportion of blacks in the local labor force").

Finally, the Second Circuit found the burden on nonminority families tolerable because those families could choose housing located in predominantly minority neighborhoods, and the order did not "expel[ ] any white families from housing they already inhabit." Pet. App. 20a. The fact is, the district court's order has had the practical effort of ending nonminority participation in the program for no legitimate reason.

III. This Case Presents Issues Of National Importance That Warrant Review By This Court.

The legality of race-conscious classifications imposed by a governmental actor is a matter to which this Court has necessarily devoted substantial attention over the past twenty years. Programs of racial balancing should never be imposed by a federal court. This Court has now firmly concluded that strict equal protection scrutiny applies to all governmentally

imposed classifications, *Adarand, supra*, and further addressed the sort of compelling governmental interests needed to justify a racial classification. *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1990). But, further elaboration of the narrow tailoring prong of strict scrutiny analysis is necessary to ensure that sufficiently limited race-based remedies are imposed only as a true last resort in the most absolutely compelling of circumstances. The decision of the Second Circuit here, as well as the First Circuit in *Mackin v. City of Boston*, 969 F.2d 1273 (1st Cir. 1992), demonstrate how undue deference to a district court dilutes an appeals court's strict and searching examination of a racial classification. The Constitution should tolerate nothing less. Review by this Court would be helpful in ensuring that racial classifications imposed by a federal court are imposed only in the most exigent of circumstances.

CONCLUSION

Petitioner City of Yonkers requests that this Court grant its petition for writ of certiorari and vacate the judgments of the lower courts.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CITY OF YONKER

Petitioner,

v.

UNITED STATES AND YONKERS BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: Thursday, October 5, 2000 Decided: JAN 5 2001)

Docket Nos. 00-6022(L) & 00-6036(XAP)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SECRETARY OF HOUSING AND
URBAN DEVELOPMENT,

Third-Party-Defendant.

SHIRLEY C. BROWN, in her capacity as a member of the State Board of Regents; LORA BRADLEY CHODOS, in her official capacity as a member of the State Board of Regents; THOMAS FREY, in his official capacity as a member of the State Board of Regents; WILLARD A. GENRICH, in his official capacity as a member of the State Board of Regents; NORMA GLUCK; EMLYN I. GRIFFITH, in her official capacity as a member of the State Board of Regents; FLOYD S. LINTON, in his official capacity as a member of the State Board of Regents;

Appendix 1

VINCENT TESE; UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; SAMUEL PIERCE; SALVADORE SCLAFINI, in his official capacity as a member of the State Board of Regents; THOMAS SOBOL; MARIO CUOMO; MARTIN C. BARRELL, in his official capacity as a member of the State Board of Regents; JAMES MCCABE, SR., in his official capacity as a member of the State Board of Regents; MIMI LEVIN LIEBER, in her official capacity as a member of the State Board of Regents; YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants-Appellees,

CITY OF YONKERS;

Defendant-Appellant-Cross-Appellee,

YONKERS BOARD OF EDUCATION,

Defendants-Appellants,

v.

YONKERS FEDERATION OF TEACHERS;

Intervenor-Defendant,

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE;

Intervenor-Plaintiff-Appellee-Cross-Appellant,

R. CARLOS CARBALLADA, in his official capacity as a member of the State Board of Regents; LOUISE P. MATTEONI, in his official capacity as member of the State Board of Regents; EDWARD MEYER, in his official capacity as a member of the State Board of Regents; JORGE L. BATTISTA, in his official capacity as a member of the State Board of Regents; STATE OF NEW YORK; BOARD OF REGENTS OF THE STATE OF NEW YORK; ADELAIDE L. SANFORD, in her official capacity as a member of the State Board of Regents; URBAN DEVELOPMENT CORPORATION OF THE STATE OF NEW YORK; GEORGE PATAKI, as Governor of the State of New York; RICHARD P. MILLS, as Commissioner of Education of the State of New York; H. CARL MCCALL, as Comptroller of the State of New York,

Defendants-Appellees.

Before: KEARSE, CALABRESI, and SOTOMAYOR, *Circuit Judges*.

* * *

CALABRESI, *Circuit Judge*:

I. BACKGROUND

In 1985, following a lengthy bench trial, the United States District Court for the Southern District of New York (Leonard B. Sand, *District Judge*) found that the City of Yonkers ("the City" or "Yonkers") had intentionally segregated its public housing and public schools on the basis

of race by relegating virtually all of its subsidized housing to the predominantly minority-resident southwest part of the City, all in violation of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1288-1376 (S.D.N.Y. 1985).

In the next year, on May 28, 1986, the District Court entered a Housing Remedy Order ("HRO"), which aimed to desegregate public and subsidized housing by requiring the City to develop additional such housing in overwhelmingly white East and Northwest Yonkers.[1] *United States v. Yonkers Bd. of Educ.*, 635 F.Supp. 1577 (S.D.N.Y. 1986). The HRO required the City to build a specified number of subsidized housing units in specified areas by a specified date and also gave the plaintiffs and plaintiffs-intervenors in the case — the United States and the National Association for the Advancement of Colored People ("the NAACP"), respectively — the right to petition the District Court for further remedial orders in case these goals were not timely met. The City refused to comply with the HRO and appealed to this Court, which affirmed the District Court's liability and remedy rulings. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184, 1236 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988). In spite of the length, care, and detail of

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1. On May 13, 1986, the District Court entered a separate order in the school segregation portion of the case, *see United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1538 (S.D.N.Y. 1986), which spawned a separate history of litigation that is not directly relevant to the present appeal.

this Court's opinion, the City resisted (and at times even stood in contempt of) the District Court's efforts to remedy the City's intentional racial discrimination.[2]

A brief history of this obstruction sets the stage for the present appeal. In January 1988, following our affirmance of the HRO, the parties negotiated a consent decree under which the City agreed to implement certain key parts of the HRO. The City, however, refused to take the actions required by the consent decree, and on June 13, 1988, the District Court entered a Long Term Plan Order ("LTPO") setting forth the specific steps the City had to take in implementing the HRO. The LTPO:

(1) required the City to ensure that a certain percentage of low income housing units were included in any new multi-family housing development;

(2) directed the City to disperse the assisted housing units in a manner that avoids the "undue concentration of both public and assisted units in any neighborhood of Yonkers;" and

---

2. On August 2, 1988, the District Court found both the City and several individual City Council-members in civil contempt of its earlier remedial orders. This Court subsequently affirmed the contempt sanctions, although it limited the fines levied against the City, which had previously been doubling on each consecutive day of non-compliance, to $ 1 million per day. *United States v. City of Yonkers*, 856 F.2d 444, 460 (2d Cir. 1988). The Supreme Court subsequently reversed the contempt sanction as applied to the individual council members. *Spallone v. United States*, 493 U.S. 265, 280 (1990).

(3) created a system of priorities among those eligible for assisted housing as follows:

> priority 1 — persons who had been residents of public or subsidized housing in the City of Yonkers between January 1, 1971 and the date at which assisted housing under the LTPO was made available;
>
> priority 2 — residents of the City of Yonkers;
>
> priority 3 — persons employed in the City of Yonkers.

Under the LTPO, the City earned housing credits (to be used towards achieving the goals of the HRO and Consent Decree) whenever it apportioned housing according to the priority scheme (and also when it took certain other housing actions).

Once again, the City failed to implement the terms of the remedial order, and in October 1993, the District Court entered a Supplemental Long Term Plan Order ("SLTPO") setting forth additional measures to remedy the City's ongoing housing segregation. Although this Court affirmed the SLTPO on appeal, *United States v. Yonkers Bd. of Educ.*, 29 F.3d 40 (2d Cir. 1994) (per curiam), *cert. denied*, 515 U.S. 1157 (1995), and although the City's earlier open and aggressive defiance of the Court desegregation orders had subsided, the City continued to fail to provide the new subsidized housing the SLTPO contemplated.

Appendix 1

Accordingly, on November 6, 1996, the District Court entered a Second Supplemental Long Term Plan Order ("SSLTPO") to promote further the implementation of the HRO. Among other things, the SSLTPO required the City to provide at least 100 additional units of affordable housing per year to LPTO qualified individuals in each of the next 6 years. The District Court also reserved the right to modify the SSLTPO on request from any party, or even sua sponte, if it determined that "the goals set forth [in the SSLTPO] are not likely to be realized in the foreseeable future, absent such modification."

In each of the first two years of the SSLTPO (1997 & 1998) the parties disputed the number of credits towards the goal of 100 units per year to which the City was entitled. In adjudicating these disputes, the District Court recognized, and shared, the plaintiffs' concern that the City's remedial measures were not adequately benefitting priority one households. At a hearing held in February 1999, the Court requested that the parties submit "a proposed revision of the remedy order designed to increase the ability of priority 1 class members to have greater housing opportunity," and also "more carefully [to] define what is meant by furthering the integrative purposes of the order."

The District Court held another hearing in September 1999, in which it heard arguments relating to the participation of priority one households during the first 2 ½ years of the SSLTPO and also on the SSLTPO's effect on furthering integration in the City's housing. The Court determined that the housing program's "accomplishments to date fall far short of what one hoped for," and it ordered the parties to confer

and to prepare a new remedial order. On December 29, 1999, the District Court granted the City nearly all the housing credits it had requested for its activities in 1998 (as it had earlier done with respect to the City's 1997 requests). At the same time, the Court granted these credits only "on the condition and understanding that no future credits will be granted unless" the City creates housing opportunities that "further the racially integrative goals which are the essence of all the Court's prior housing remedy orders intended to counter the effects of prior racial discrimination in housing in Yonkers."

To this end, the District Court entered the Third Supplemental Long Term Plan Order ("TSLTPO"). The TSLTPO specified that, with exceptions that are not relevant here, future housing credits would be awarded to the City only:

(a) for priority one households that move to census blocks in East and Northwest Yonkers that, as of 1990, had a minority (black and Hispanic) population of below 45%;

(b) for minority priority two & three households that move to census blocks in East and Northwest Yonkers that, as of 1990, had a minority population of below 45%; and,

(c) for non-minority priority two and three households that move to census blocks in East and Northwest Yonkers that, as of 1990, had a white population of below 45%.

In addition, as a carrot to accompany this stick, the District Court instituted a complicated bonus system under which the City would, if it reached certain targets for the placement of priority one households, receive more than one unit of housing credit for each household placed.[3]

With minor revisions that are not relevant here, this is the order the City of Yonkers now appeals. Specifically, the City contends (1) that the District Court's newest remedial order represents an improper modification of the consent decree that had previously been in place and (2) that the new order employs race-conscious remedial devices in an unconstitutional manner. At the same time, the NAACP cross-appeals the bonus-credit element of the TSLTPO, arguing that this modification improperly weakens the remedial character of the order and improperly rewards the City for its dilatory tactics. Because we find that the TSLTPO satisfies the standards for modifying a consent decree set out in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383-85 (1992), and because we find that the TSLTPO's use of race satisfies even the strict scrutiny to which legislative race-conscious remedies must be subjected, *see Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 227 (1995), we reject the City's challenge. Furthermore, although we might not have adopted the bonus-credit element of the TSLTPO ourselves, we defer to the District Court's more intimate knowledge of the case and on that basis reject the NAACP's cross appeal. We accordingly affirm the District Court's remedial order in its entirety.

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3. It is worth noting that there is a stick built into even the carrot: if the City falls short of these goals, it receives less than one unit of credit for each priority one family placed.

Appendix 1

II. DISCUSSION

A. *The City's Appeal*

1. *The Modification*

The City's first contention on appeal is that the TSLTPO represents an improper, and hence impermissible, modification of the consent decree that preceded it, namely the SSLTPO.[4]

Fed. R. Civ. P. 60(b) clearly contemplates that remedial orders may be modified, providing that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Furthermore, because consent decrees are injunctions, their modifications are reviewed for abuse of discretion only. *Juan F. v. Weicker*, 37 F.3d 874, 878 (2d Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995). Consent decrees are, however, also contracts between the parties. *Id.* This fact, combined with the concern that allowing consent decrees to be too

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4. We reject the NAACP's contention that the terms of the TSLTPO do not modify those of the SSLTPO.

easily modified would discourage parties from accepting compromise settlements, has led to a significant cabining of District Courts' discretion to modify consent decrees. "Modification is a remedy not to be lightly awarded, 'especially where the design is not to relieve a party of obligations but to impose new responsibilities.' " *Id.* (quoting *Walker v. HUD*, 912 F.2d 819, 826 (5th Cir. 1990)).[5]

At the same time, however, the past decade has seen a significant relaxation of the restrictions imposed on District Courts seeking to modify consent decrees. At least in the context of institutional reform litigation, the Supreme Court has softened the traditional rule that "[n]othing less than a clear showing of grievous wrong evoked by new and unforseen conditions" could justify modifying a consent decree. *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932). In reconsidering this rule, the Supreme Court has reasoned that "[t]he experience of the District Courts and Courts of Appeals in implementing and modifying [consent] decrees has demonstrated that a flexible approach is often essential to achieving the goals of reform litigation," *Rufo*, 502 U.S. at 381, and that this flexible approach is especially important because consent decrees in this context "reach

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5. Although the text of Fed. R. Civ. P. 60(b) focuses on modifications that relieve a party from the operation of a consent decree, the above quotation clearly demonstrates that modifications, such as the one in the TSLTPO, that increase the obligations imposed by a consent decree are also permissible. *See also United States v. Western Elec. Co.*, 46 F.3d 1198, 1202 (D.C. Cir. 1995) (noting that "[a]t the request of the party who sought the equitable relief, a court may tighten the decree in order to accomplish its intended result").

beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions." *Id.* (internal quotation marks omitted).

Changes in consent decrees are not trivial matters even under the new standard. The Supreme Court has made clear that "it does not follow that a modification will be warranted in all circumstances," and that a party seeking an alteration bears the initial burden of establishing that a significant change in circumstances warrants the modification. *Id.* at 383. But instead of facing *Swift*'s requirement of making "a clear showing of grievous wrong evoked by new and unforeseen conditions," *Swift*, 286 U.S. at 119, a party seeking a modification may now meet its burden simply by showing that there has been "a significant change either in factual conditions or in law." *Rufo*, 502 U.S. at 384.[6] And under *Rufo*, a modification due to changed factual conditions — the circumstance relevant to the case before us — is "appropriate when a decree proves to be unworkable because of unforseen obstacles,"[7] or when "enforcement of the decree without modification would be detrimental to the public interest." *Id.*

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6. In articulating this standard, Rufo in effect adopted the rule this Court had articulated earlier in *New York State Assoc. for Retarded Children v. Carey*, 706 F.2d 956, 969-71 (2d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983).

7. Furthermore, *Rufo* notes that "unforseen" does not in this context mean "unforseen and unforeseeable" and that "[l]itigants are not required to anticipate every exigency that could conceivably arise during the life of a consent decree." *Id.* at 385.

The City, which recognizes these developments in the law, contends that the modification at issue in the present appeal does not pass even the more flexible *Rufo* test. That contention, however, may be straightforwardly rejected. The SSLTPO was adopted to promote the implementation of the HRO and thereby to further the ultimate goal of remedying the City's past intentional racial discrimination in its public and subsidized housing. And by the time of the modification before us (i.e., the adoption of the TSLTPO), it had become manifest that neither the intermediate nor the ultimate goal of the SSLTPO was being achieved.

To begin with, the City's actions under the SSLTPO were clearly failing to reflect the priority scheme that had been established under the HRO. In 1997, only 29% of the SSLTPO's beneficiaries were priority one households, 68% were priority two, and 3% were priority three; and in 1998, only 7.9% were priority one, 85.4% were priority two, and 6.7% were priority three. Furthermore, the City's actions under the SSLTPO were similarly inadequate in achieving the "integrative goals which underlie the entire remedy order."[8] Thus, the District Court found that during 1998 (the second year of the SSLTPO), 31 out of the 73, or 45.5% of, public housing moves completed under the SSLTPO were non-integrative (that is, they involved moves by whites into

8. The City's response — that 70% of the beneficiaries under the SSLTPO were minority families — cannot answer this charge. Achieving the remedy's *integrative* goals depends not simply on providing subsidized housing to minority families but rather on locating minority housing outside of predominantly minority neighborhoods or locating white housing outside of predominantly white neighborhoods.

census blocks that were less than 45% minority or by minorities into census blocks that were more than 45% minority).[9] And, the Court also concluded that in the first eight months of 1999 (the third year of the SSLTPO, and the period leading up to the modification at issue and the adoption of the TSLTPO), 13 out of the 26, or 50% of, public housing moves under the SSLTPO were non-integrative.[10] These data reveal that more than two years after its adoption, roughly half of those housing allocations made under the SSLTPO whose effects on the racial segregation of Yonkers public housing are known remain non-integrative.[11]

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9. Our own inspection of Gov't Exhibit I generates slightly different figures, namely that 29 out of 63, or 46% of, moves were non-integrative. Furthermore, the government brief reports still other numbers, specifically that 33 of 58, or 59.6% of, moves were by minority households into "predominantly minority communities" or by white households into "predominantly white communities." The pages of the appendix the government cites in support of its contention allude to the question but contain no precise claim.

10. Our own inspection of Gov't Exhibit J once again suggests slightly different numbers, specifically that, 14 out of 26, or 53.8% of, moves were non-integrative, and the government brief reports that 16 of 26, or 61.5% of, moves were by minority households into or "adjacent" to "predominantly minority communities" or by white households into "predominantly white communities." And again, the pages of the appendix the government cites in support of its contention allude to the question but contain no precise claim. The NAACP has asserted that 13 of these 26 moves were non-integrative.

11. The data needed for determining the integrative effect of the City's housing program during the first year of the SSLTPO are not available.

In light of these facts, we conclude, with the District Court, that the SSLPTO "prove[d] to be unworkable because of unforseen obstacles" — specifically the continued failure of the City to serve priority one households and to promote integrative housing moves — and that continued "enforcement of the [SSLTPO] without modification would be detrimental to the public interest" — the achievement of the goals of serving priority one households and desegregating Yonkers public housing. *Rufo*, 502 U.S. at 384. Accordingly, we hold that the modification of the SSLTPO embodied in the TSLTPO was well within the discretion of the District Court, and we reject this element of the City's appeal.

2. *The Race-Conscious Remedy*

The City's second contention on appeal is that the TSLTPO — by conditioning the City's receipt of credits for housing priority two and three families on the race of the families and on the racial makeup of the neighborhoods in which they are housed — employs a race-conscious remedy in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Such a race-conscious remedy, the City contends, cannot survive the strict scrutiny to which such remedies must be subjected under *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 227 (1995); *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (plurality opinion of Justice Powell).

In this respect we first note that, although the language adopted by *Adarand*, that "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny,"

Adarand, 515 U.S. at 227, is unquestionably broad, both *Adarand* and *Wygant* involved race-based remedies adopted by governmental agencies *other* than courts. In *Adarand*, they were imposed by the United States Congress (at 15 U.S.C. § 644(g)(1)), *see Adarand*, 515 U.S. at 206; in *Wygant*, by a local school board, *see Wygant*, 476 U.S. at 269-70. And it may be, as Justice Stevens argued in casting the fifth vote to affirm a court-ordered race-based remedy integrating the Alabama State police, that strict scrutiny does not apply to race-based remedies ordered by "a district judge who has found that the governmental unit before him is guilty of racially discriminatory conduct that violates the Constitution." *United States v. Paradise*, 480 U.S. 149, 193-94 (1987) (Stevens, *J.*, concurring); *see also Crumpton v. Bridgeport Educ. Ass'n*, 993 F.2d 1023, 1030-31 (2d Cir. 1993) (suggesting that a district court's race-based remedy may not be subject to strict scrutiny where it follows an express finding that a government agency employed practices that contributed to racial segregation).

We need not, however, reach this question in order to decide the case before us. As the plurality opinion in *Paradise* points out, a race-conscious remedy that can survive even strict scrutiny may be affirmed regardless of whether strict scrutiny or only a lesser standard of review applies. *Paradise*, 480 U.S. at 166-67. And the remedy embodied in the TSLTPO clearly survives even strict scrutiny.

To pass strict scrutiny, a race-conscious remedy must be narrowly tailored to further a compelling government

interest.[12] *Adarand*, 515 U.S. at 227. In the case before us, there is no doubt that the second element of this requirement is met. The district court expressly found that the City has engaged in intentional racial discrimination in its subsidized housing program, *United States v. Yonkers Bd. of Educ.*, 624 F.Supp. at 1288-1376, and "[t]he Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *Paradise*, 480 U.S. at 167. Accordingly, the parties' arguments on appeal have quite properly focused on the first element of the strict scrutiny requirement, namely the question whether the district court's race-conscious remedy is narrowly tailored to further this unquestionably compelling interest.

To determine whether a race-conscious remedy is narrowly tailored to the ends it serves we must consider (1) the necessity for relief and the efficacy of alternative remedies, (2) the flexibility and duration of the relief, (3) the relationship of the numerical goals of the relief to the relevant labor market (or to its analog in a case involving something other than employment discrimination), and (4) the impact of the relief on the rights of third parties. *Paradise*, 480 U.S. at 171. The TSLTPO comfortably passes all four elements of this test.

First, the necessity of relief in the case at bar is patent. As we have said in an earlier opinion in this case, " 'the

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12. A district court's determination that a race-conscious remedy is narrowly tailored to advance a compelling government interest involves an application of law to facts, which we review *de novo*. *See Engineering Contractors Ass'n. v. Metropolitan Dade County*, 122 F.3d 895, 905 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998).

choice of remedies to redress racial discrimination is a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court' . . . . The district court, which has 'first-hand experience with the parties and is best qualified to deal with the flinty, intractable realities of day-to-day implementation of constitutional commands,' must be given a great deal of flexibility and discretion in choosing the remedy best suited to curing the violation . . . ." *United States v. Yonkers Bd. of Educ.*, 837 F.2d at 1236 (quoting *Paradise*, 480 U.S. at 184 (other internal quotation marks omitted)). Furthermore, even if a race-conscious judicial remedial order were permissible only where no less restrict alternative is available, that standard is met in the case before us. In spite of fifteen years of remedial efforts encompassing four race-neutral remedial regimes (the HRO *simpliciter*, and the HRO combined with the LTPO, the SLTPO, and the SSLTPO), and at least partly because of the active and passive resistance to integration displayed by the City (and documented in both this and in our earlier opinions), Yonkers public housing remains substantially segregated even today. Roughly half of the housing moves under the most recent race-neutral remedy were non-integrative, *see supra*, at __. And, at the September 9, 1999 hearing that led to the adoption of the TSLTPO, the District Court, expressly responding to the City's contention that a race-based remedy would fail strict scrutiny, concluded that "the experience [of race-neutral remedies] has not been satisfactory." We agree, and hold that the first of the *Paradise* factors is satisfied in this case.

Second, the TSLTPO is both "flexible" and "ephemeral." *Paradise*, 480 U.S. at 177-78. The TSLTPO contemplates

that the District Court will adjust the terms of the Order as needed (for example, the circumstances in which the bonuses and penalties that the Order mandates will apply). And, as its focus on determining the grant of credits towards the goals set forth in the SSLTPO reveals, the TSLTPO will remain in force only until the discrete goals of the SSLTPO and of the earlier remedial Orders in this case have been met. Accordingly, we conclude that the second *Paradise* factor is satisfied.

Third, the numerical goals and conditions for awarding housing credits adopted by the TSLTPO are not disproportionate to the racial mix of Yonkers residents or the size of the Yonkers housing market. The TSLTPO retains the reasonably-paced (100 credits per year) integrative program adopted by the SSLTPO. Moreover, we "should not second-guess the [District Court's] carefully considered choice of the figure[s] necessary to achieve its many purposes, especially when [those] figure[s] [are] hedged about with specific qualifying measures designed to prevent any unfair impact that might arise from rigid application." *Paradise*, 480 U.S. at 182. The third *Paradise* factor is, therefore, satisfied.

And fourth, the TSLTPO does not unduly burden the rights of third parties. The City's claim that the TSLTPO "effectively constitute[s] an outright ban on a non-minority family's opportunity to access affordable housing in Yonkers," is meritless. The TSLTPO places no limits on the number of white families that may move into subsidized housing in greater than 45% minority neighborhoods or on the number of credits the City may receive for such moves.

The TSLTPO also credits the City for providing housing opportunities in areas that are not predominantly minority to any priority one household, including white priority one households. Furthermore, insofar as the TSLTPO effectuated any reduction in the public housing available to white residents of Yonkers (a consequence we do not in any event foresee), it would do so only by reducing the number of new white applicants who would receive housing and not by expelling any white families from housing they already inhabit. And as the Supreme Court has observed in the context of access to employment, *Wygant*, 476 U.S. at 282-83, and to places at university, *id.*, at 283 n. 11, the denial of a new application is much less burdensome than the loss of an existing good. We readily find that the fourth *Paradise* factor is also satisfied.

Finally, we must, in deciding whether the TSLTPO was narrowly tailored, "acknowledge the respect owed a district judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment." *Paradise*, 480 U.S. at 183. The District Court has first-hand experience of the long and often difficult effort that remedying the City's intentional racial discrimination entails, in other words, of the "realities of day-to-day implementation of . . . constitutional commands." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6 (1971). After having carefully and patiently attempted to achieve this end by race-neutral means, after having expressly determined that such means were not succeeding, and after hearing from both sides to the dispute, the District Court adopted a race-conscious remedy that is both temperate and responsible. We therefore hold that the TSLTPO is narrowly tailored to the compelling

state interest of remedying the City's past intentional racial discrimination, and we reject the City's constitutional challenge to the order.

3. *The NAACP's Cross-Appeal*

In addition to granting the City housing credits only for integrative moves, the TSLTPO gives the City bonus credits (more than one credit per move) if it achieves certain targets for the placement of priority one households and imposes certain penalties (grants less than one credit per move) if the City fails to achieve these targets. The NAACP cross appeals the bonus-credit element of this regime, arguing that it improperly rewards the City for its earlier obstructionist and delaying tactics. *Cf. Reed v. Rhodes*, 179 F.3d 453, 478 (6th Cir. 1999) (Cole, *J.*, dissenting).

We are skeptical of giving the City credit where no credit is due and understand the NAACP's frustration with this element of the TSLTPO. At the same time, we review District Court modifications of consent decrees for abuse of discretion only, *Juan F.*, 37 F.3d at 878, and we do not believe that the District Court went beyond its discretion in modifying the SSLTPO in this way. Judge Sand has presided over this difficult and exhausting case with estimable patience and skill, and we will not second-guess his informed balancing of incentives in an attempt to craft a remedial plan that will be effective in the face of opposition. In short, we do not wish to have what may or may not be the best become the enemy of what is clearly the good. Furthermore, the penalty imposed in the same breath as the bonus demonstrates that the District Court was well aware of the plaintiffs'

concerns that it was rewarding the City for delay and that it sought to present the City with even-handed rather than overly generous incentives. Accordingly, we reject the NAACP's cross appeal.

III. CONCLUSION

For all the foregoing reasons, we AFFIRM the District Court's entry of the TSLTPO in its entirety.

APPENDIX 2 — THIRD SUPPLEMENTAL LONG TERM PLAN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 29, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 CIV 6761 (LSB)

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH NAACP, et al.

Plaintiff-Intervenors,

v.

YONKERS BOARD OF EDUCATION, et al.

Defendants.

THIRD SUPPLEMENTAL LONG TERM PLAN ORDER

On September 9, 1999, the Court held a hearing regarding the interpretation and implementation of the Court's prior housing remedy orders. These orders include, the 1986 Housing Remedy Order (HRO), the 1988 First Remedial Consent Decree in Equity, the 1988 Long Term

Plan Order (LTPO), the 1993 Supplemental Long Term Plan Order Adopting Additional Remedial Measures (SLTPO), the 1996 Second Supplemental Long Term Plan Order (SSLTPO) and the 1998 Plan (regarding assistance from the Empire State Development Corporation).

On February 24, 1999, the Court held a hearing addressing the status of compliance with the SSLTPO. The Court also received written submissions from the parties. The Court directed the parties to examine matters further in meetings with the Housing Monitor. Pursuant to the Court's Order dated June 1, 1999, the parties made additional written submissions on or about June 21, 1999. After reviewing recommendations made by the Housing Monitor, dated July 28, 1999, and reviewing further written comments submitted by the parties in July and August 1999, as well as considering the parties' oral argument made during the hearing on September 9, 1999, the Court directs that the following actions take place to further the implementation of the remedy orders in this case. To the extent inconsistent with prior orders of the Court, the following provisions shall govern:

Construction of Hoover Road, Grassy Sprain and Yonkers Avenue Sites

1. Construction shall commence on the Hoover Road and Grassy Sprain sites prior to April 1, 2000 and on the Yonkers Avenue Site prior to March 1, 2000.

2. On September 17, 1998, the Court ordered the City of Yonkers to take all appropriate steps to implement

construction of the Yonkers Avenue development utilizing the Housing Investment Trust subsidy for twenty (20) units to be occupied by households with income under 50% of the applicable Westchester County median. Recently, the developer for the Yonkers Avenue site informed the Court that it wants to use an alternative financing source that does not include the Housing Investment Trust subsidy. The purpose of the subsidy was to ensure the long term affordability of units serving households below 50% of Westchester County median income. Therefore, the Court orders the City of Yonkers to implement the construction of Yonkers Avenue without the Housing Investment Trust subsidy as follows:

a. the total number of units may be increased from sixty-four (64) up to seventy-two (72) units which additional units may include one apartment (1) for a building superintendent and seven (7) apartments that shall be rented at market rate;

b. the rent for seven (7) of the original units shall be set at 30% of 20% of the Westchester County median income and shall be rented to households with incomes below 40% of Westchester media income;

c. the rent for thirteen (13) of the original units shall be set at 30% of 45% of Westchester County median income and shall be rented to households with incomes below 50% of Westchester County median income; and

d. the Yonkers Avenue development and occupant eligibility structure set forth in subsections b and c

above shall be maintained for the affordability term described in Section 4 of the Long Term Plan Order. However, rents may be increased proportionately for the units in subsections b & c above as Westchester County median income increases.

Existing Housing Credits

3. The City of Yonkers requested a total of 85 existing housing credits for Year 2 of the program which is the calendar year 1998. In an earlier Order, this Court awarded 43 credits. Of the remaining forty-two (42) disputed credits, eleven (11) are requested for units sold though the City's YCAP program. The plaintiffs and the Housing Monitor maintain that the City was informed last year that they did not oppose granting credits for YCAP units for Year 1 provided that the YCAP program adopt the affordability restriction and the LTPO priority system in future years. Although the YCAP program adopted the affordability restriction on units, it did not adopt the LTPO priority system in Year 2. The City's request for credit for the eleven (11) YCAP units is denied for Year 2. However, if the YCAP program adopts the LTPO priority system, the City would be eligible to receive credit in future years for units obtained through the YCAP program if all other program requirements are met.

4. The plaintiffs also oppose the City's request for an additional thirty-one (31) credits because they claim that the moves did not further the racially integrative purposes of the Court's remedial orders. Twenty-nine (29) of the seventy-three (73) moves in 1998 consisted of non-minority

households moving to predominantly White neighborhoods (i.e. neighborhoods with less than 45% Black and Hispanic population as of the 1990 Census). Two (2) of the 1998 moves consisted of Black households moving to Runyon Heights, a predominantly minority neighborhood in Yonkers (i.e. a neighborhood with more than 45% Black and Hispanic population as of the 1990 Census). As of August 16, 1999, nine (9) of twenty-six (26) moves in 1999 consisted of non-minority households moving to predominantly White neighborhoods and four (4) minority households moving to Runyon Heights. Such moves do not further the racially integrative purpose of the Court's remedial orders in this case. Furthermore, only four (4) Priority I households made moves in 1998. However, in recognition of the City's efforts to implement an outreach program to Priority 1 applicants, to develop a rental housing program and to operate an existing housing program which provides affordable homeownership opportunities to moderate and low-income families, the Court will award the City one credit for the two moves to Runyon Heights in 1998 and twenty-nine remaining credits for a total of thirty (30) additional credits for 1998.

Future Implementation of Existing Housing Program

5. The granting of credits for 1998 as discussed above is made on the condition and understanding that no future credits will be granted unless housing opportunities created by the existing housing program further the racially integrative goals which are the essence of all the Court's prior housing remedy orders intended to counter the effects of prior racial discrimination in housing in Yonkers. Toward

that end, the Court further orders that future full credits will only be allowed and AHTF funds may only be used for the creation of affordable housing opportunities as follows:

a) For Priority 1 households who move to census blocks in East and Northwest Yonkers which as of 1990 had a Black and Hispanic population which together totaled less than 45%;

b) For minority Priority 2 and 3 households who move to census blocks in East and Northwest Yonkers which as of 1990 had a Black and Hispanic population of less than 45%;

c) For non-minority Priority 2 and 3 households who move to census blocks in East and Northwest Yonkers which as of 1990 had a White population of less than 45%; and

d) Nothing in this Order shall alter the ability of the City to use AHTF funds or receive half credits for moves to Southwest Yonkers as set forth in Section 10 of the Long Term Plan Order.

6. Starting in the year 2000 (Year 4), the City shall receive one credit for each Priority One Placement (hereinafter "PIP"). An initial annual goal of 20 PIPs is established until further rental programs for Priority 1 households are developed by the City. If the City reaches its annual goal of PIPs it shall receive a bonus of 50% (i.e. if a goal of 20 PIPs is reached, the bonus is 10 credits). If the PIP goal is exceeded, the City shall also receive two (2)

credits for each PIP placement in excess of the goal (i.e. if there are 24 PIPs, the City will receive 20 credits, plus a bonus of 10 credits plus 8 credits for the four PIPs in excess of the goal). If the PIP goal is not reached, the number of credits will be diminished by the number of units in the shortfall (i.e. if the goal is 20 PIPs, but only 17 occur in a year, the City will receive 14 credits). If there are not at least 10 PIPs annually, the City will receive no credits for PIP placements. The Court will adjust the annual PIP goal as needed.

Rental Programs

7. While an effective rental program should be developed and implemented, the affordable housing program should remain essentially a homeownership program. On June 22, 1999, the City proposed a rental program which would include home purchase assistance for 2-4 family homes, lease-to-purchase assistance and rental buydowns. The Court orders the City to implement immediately these three programs and to give priority in the programs to Priority 1 households. The Court sets an annual goal of twenty (20) rental units commencing January 1, 2000.

8. The City shall also explore further development of a Section 8 rental assistance program to begin by March 15, 2000. The City shall discuss this possibility with the New York State Division of Housing and Community Renewal and the United States Department of Housing and Urban Development within the next sixty (60) days. The Housing Monitor and the United States shall assist the City in this effort.

Appendix 2

9. Upon establishment of a Section 8 program, the Court will consider whether an increase in the annual goals is appropriate.

Priority 1 Outreach Program

10. The City shall implement immediately the Priority 1 Outreach Program outlined in its June 22, 1999 proposal for the existing homeownership program. The City shall develop an Outreach program for its existing rental program within thirty (30) days of the date of this order and submit it to the parties and Housing Monitor for comments.

Yonkers Green

11. The history of subsidized housing projects in Southwest Yonkers is that they were initially conceived of as being integrative with affirmative marketing plans which proved unsuccessful and were later abandoned. The concern of the NAACP regarding the concentration of subsidized housing to Southwest Yonkers on the basis of race is, therefore, entirely understandable. Phase One of Yonkers Green, however, may go forward as follows:

a) the LTPO priority system shall not be used by the developer or the City when selling homes at Yonkers Green so as to avoid limiting the housing choice of current or prior pubic and assisted housing residents to Southwest Yonkers;

b) The City shall submit a specific description of a proposed marketing plan, outlining among other

things, the financial and personnel resources to be committed to the plan to the parties and Court Monitor for review on within thirty (30) days of the date of this Order. The final plan and the following reporting requirements shall be incorporated into the land development agreement entered into between the City and the developer. Every ninety (90) days after the marketing begins, the City shall submit a written report to the Housing Monitor and the parties setting forth the results to date of such marketing plan. The plan shall not be discontinued, nor shall the resources devoted to it be diminished, until its goals are achieved or upon further order of the Court. The Court *sua sponte*, or upon the request of any party, may order the City to require the developer to increase or modify marketing efforts should it appear that the marketing plan is falling short of its goals.

Dated December 29, 1999
New York, New York

SO ORDERED:

s/ Leonard B. Sand
LEONARD B. SAND
UNITED STATES DISTRICT
JUDGE

APPENDIX 3 — AMENDMENT TO THIRD SUPPLEMENTAL LONG TERM PLAN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JANUARY 24, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH — NAACP, et al.,

Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION, et al.

Defendants.

AMENDMENT TO THIRD SUPPLEMENTAL LONG TERM PLAN ORDER

To obviate any confusion which may otherwise exist, the Third Supplemental Long Term Plan Order, dated December 29, 1999, is amended by adding at the start of paragraph 5 the following sentence:

Appendix 3

This paragraph 5 relates solely to the existing housing program and in no way alters the requirements for occupancy of new construction.

SO ORDERED

Dated: New York, New York
January 24, 2000

s/ Leonard B. Sand
U.S.D.J.

APPENDIX 4 — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 30, 1986 AND MAY 2, 1986, RESPECTIVELY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 6761

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

YONKERS BOARD OF EDUCATION, et al.,

Defendants.

April 30, 1986
10:00 a.m.

* * *

[178] Mallach – Direct

Q. Mr. Mallach, assuming that the remedial order contemplates some provision of housing beyond the 200 public housing units to be provided by HUD, in your opinion is it important to have a unit goal for the provision of that housing?

A. Yes, I believe so.

Q. And assuming that the court finds that the remedial order should you include a unit goal, how should the unit goal be determined?

A. I think it should be determined basically by an assessment of feasability. In other words, it should grow out of an analysis of the number of units that could realistically be provided in the community.

That in turn would include an analysis which would be much more detailed than anything I have been able to do up to this point of the vacant and underutilized land that would be available for such development, the opportunities for rehabilitation, acquisition of existing units, creation of accessory apartments and so forth, so that it would be a goal that would reflect what is feasible and what is realistic but at the same time would be one that would require a significant and conscious effort to achieve.

Q. And why is it important to have a goal that requires some serious effort to achieve it?

[179] A. I think these are really practical considerations rather than anything that is specifically legal, but I think if — housing development is difficult, time consuming and fraught with uncertainty, and whenever you set a goal there is a risk, in fact, a likelihood that you will fall somewhat short of that goal.

So if you set a goal that is really negligable, that requires no major efforts to pursue —

MR. ABRAM: Your Honor, I am going to object to the answer and question. This is entirely speculative. This is so far completely beyond the ken of what has just been proffered as his area of expertise, planning.

He is giving apparently some type of a legal advisory opinion totally without foundation, totally speculative.

THE COURT: Overruled.

MR. ABRAM: I believe it should be stricken.

THE COURT: Overruled.

Q. Would you continue.

A. I'm sorry. By establishing a goal that reflects a significant effort, I think the likelihood is much greater that you will at least approach that goal, at least get a significant number of units provided than if you set a more modest goal.

Q. In your experience, does setting a substantial [180] goal relate at all to the racial discrimination issues in this case?

A. I think it relates directly and unequivocally to those issues.

Q. In what way?

A. I think the issue as I understand it, or a significant issue in this case is remedying the history of racial

discrimination in terms of providing meaningful racial integration with particular respect to lower income households in the City of Yonkers.

Now, given the patterns of segregation that exist in the city and given the cost to the existing housing in the city, it is in my opinion extremely unlikely that any significant integration will come about in the city of Yonkers unless there is a significant goal for the production of new housing units affordable to lower income households in areas that are not at present areas of minority concentration.

Q. And can you explain more about why new units are necessary?

A. I think there are a number of reasons. If you look at the housing market in Yonkers, the first thing is that the city of Yonkers and the city outside the southwest corner in particular has an extremely low housing vacancy rate. In fact, it is considered something of a norm in [181] housing market analysis that a rental vacancy rate below five percent is considered a tight housing market. The rental vacancy rate in Yonkers, excluding southwest Yonkers, according to the 1980 census, was 1.2 percent. That is effectively a zero vacancy rate.

Q. And what is that based on?

A. That is based on, directly on the 1980 census of housing.

Appendix 4

MS. VANDERWICKEN: Your Honor, I would like to offer into evidence the 1980 census as foundation for some of Mr. Mallach's testimony.

THE COURT: RH 1?

MS. VANDERWICKEN: Yes.

MR. ABRAM: Your Honor, the only comment I have is that at Mr. Mallach's deposition on April 22nd — I seem to have been here three years ago — Mr. Mallach was asked if he was going to do any additional analysis and proffering any additional exhibit. He said no. Last night at the conclusion of this hearing Mr. Sculnick asked the same think of Ms. Vanderwicken. She said no.

THE COURT: The United States census figures, which I could judicially note if they had not been received in evidence — how much time do you want to spend arguing that?

GX RH 1 received.

[182] (Exhibit GX RH 1 for identification was received in evidence)

Q. Do you have a copy with you, Mr. Mallach?

A. No, I don't, but I have noted some of the salient features.

Appendix 4

Q. Is there any other data that indicates the vacancy rates in Yonkers that you are aware of?

A. The vacancy rates — the only data that I am familiar with with respect to vacancy rates is that from the 1980 census. There may be other data, but I am not familiar with it.

Q. Okay. All right. Now, why does it matter that the goal for housing be for low and moderate income families?

A. I think the principal reason is that that is where the housing needs are in Yonkers, and particularly within the minority population. I mean, I have looked at the census data with respect to the distribution of housing needs in the black population of Yonkers, also familiar with other sources of data in terms of how the presence of substandard housing conditions relates to household income, and based on that I would say the overwhelming majority of black families in the city of Yonkers who live in deficient housing conditions of one kind or another are very low income households, in other words, 50 percent of the area [183] median or less, and most of the remainder are low income households.

Q. All right. Let me show you what has been marked for identification as Government Exhibit RH 2 and ask if you can identify and describe that?

A. Yes. This is a table that I prepared by extracting data from the census document marked as RH 1.

Q. And what does it signify?

Appendix 4

A. This data shows the number and percentage of households, of renter households in the Yonkers black community spending 30 percent or more for shelter, which is the recognized standard of financial hardship as defined by the federal government.

And what it shows is that, first, roughly 2700 households out of about 6500 do suffer from financial hardship. This is over 40 percent. Of those, nearly 2200 or over three quarters are very low income households, and all of the remaining number are low income households.

There are for all practical purposes no non-lower income households, black households in the city of Yonkers suffering financial hardship according to the 1980 census. Of course, in all probability there are a few, but from a statistical standpoint, financial housing need is purely a lower income phenomenon.

Q. Okay.

[184] MS. VANDERWICKEN: I would like to offer GX RH 2 into evidence, your Honor.

THE COURT: Received.

(Exhibit GX RH 2 for identification was received in evidence)

Q. I would like to show you what has been marked four identification GX RH 3, Mr. Mallach, and could you describe that document?

Appendix 4

A. This is another tabulation of data from the 1980 census, and it shows the number and percentage of white and black households respectively living in three different types of substandard housing conditions, units lacking plumbing, units with inadequate heating, and overcrowded units.

Q. Okay. Can you describe what the footnote or explain the footnote in this?

A. Yes. The census tabulation for units with inadequate heating does not provide a precise basis for eliminating the overlap between that category and other deficiency categories. So for purposes of making the estimate on this table, I reduced the number of such households by 20 percent to account for the overlap.

Q. All right. Did you prepare an exhibit similar to this comparing housing conditions of Hispanics and whites?

[185] A. No.

Q. And why not?

A. The problem is that the way the Hispanic category is defined in the census it is not a mutually exclusive category, so it includes some black families, some white families. It's a supplementary category, if you will, so I felt that it would not provide a clear statistical picture.

Q. Okay. What is the significance of this exhibit to the remedy?

A. I think the significance is in a couple of features. First, it shows that a much larger percentage of black households than white households suffer from substandard or overcrowded housing conditions, roughly 15 percent compared to 6.5 percent.

Secondly, it shows that the overwhelming majority of black households in Yonkers are renter households, which again, given the extent to which they are lower income households is not surprising, but I believe it is significant in terms of potential remedy concerns in terms of the types of housing that will have to be provided for this population.

Q. Okay. Are there any other —

MS. VANDERWICKEN: First of all, I would like to offer RH 3 into evidence, your Honor.

[186] THE COURT: Received.

(Exhibit GX RH 3 for identification was received in evidence)

Q. Are there any other reasons for focusing a goal on lower and moderate income families that are particularly relevant to the court's finding of discrimination in this case?

A. I think there are at least two features that come to mind. One is, of course, that the discrimination as I understand it was principally with respect to the location of low and moderate income housing. This was not principally a case involving private discrimination in the

conventional housing market. So in that sense, to the extent that lower income households were the victims of discrimination, I think there is a logic to it providing that they benefit from the remedy.

A second issue is the question of where the need exists. If you are going to provide a remedy in the form of construction of housing in areas that are not minority concentrated areas and hope to attract minority families to these units, the minority families who are most likely to be attracted to these units are minority families who have a need for decent or affordable housing, because families who already have a unit that's of high quality or readily affordable are significantly less likely to want to move.

[187] Now, the fact is the households who fall into that category are overwhelmingly made up of low income and very low income households. So I think for a remedy to be effective, these households are going to have to be given an opportunity.

Q. Now, does a focus on low and moderate income housing mean that the housing developed pursuant to a remedial decree would only be for low and moderate income people?

A. No, in fact, on the contrary, given the absence of massive federal subsidies or virtually any federal subsidies at all, I think economic realities dictate that if you are going to provide any appreciable number of lower income units over and above the 200 public housing units that have already been committed it is going to be necessary to package them

in some fashion in conjunction with moderate or middle or even upper income housing units to create a source of internal subsidy that would make lower income units economically feasible.

Q. Mr. Mallach, the city's proposal suggests that the remedy should make as a priority home ownership as opposed to rental. In your opinion, is it appropriate for the remedy to include some home ownership as part of the housing provision?

A. Yes.

[188] Q. And why is that?

A. Because I think overall home ownership is something which in our society is considered a very positive attribute, and because I think there are many people including minority people, including low and moderate income households who do aspire to home ownership and who can be home owners under proper circumstances.

So I think to the extent that those people exist and to the extent that home ownership would be beneficial for those people and a positive feature in the neighborhoods where the units would be built, I would certainly support some number of those units.

Q. In your opinion, is it appropriate for the priority to be given to the provision of ownership units?

A. No.

Q. And why is that?

A. The problem is that given that the concentration of the housing need is most heavily within the very low income population, the reality is that a very large percentage, arguably a substantial majority of those families are not realistic candidates for home ownership. So that providing home ownership units that are nominally targeted to that population would in reality exclude all but the cream, if you will, of those households.

* * *

[264] Mallach – Cross

* * *

Q. Now, you did not directly testify about affirmative marketing, at least I didn't hear any testimony about that. Do you believe that affirmative marketing has to be a component of this remedy order?

A. I believe it's essential.

Q. And in what way?

A. I think to the extent that lower income units are built outside the southwest Yonkers area, I think there is a very real possibility that unless you have affirmative marketing to reach people in the southwest, you will get developments that will have only very small minority representation. I think developments with federally subsidized projects, many such

projects that have been built in largely white suburban areas have turned — especially senior citizen projects — have turned out to be all or virtually all white projects, especially where word of mouth and informal means of communication were the principal ways by which people first learned about the [265] availability of the units.

Q. Do you see affirmative marketing as a commitment to be made by any developer including the not-for-profit developer in its contract with the city?

A. Absolutely. In fact, in many of the mandatory set-aside ordinances that I am familiar with and some that I have helped draft have included an ordinance provision requiring affirmative marketing of all developers building under the ordinance.

* * *

[310] Q. It's your professional opinion, isn't it, that in terms of achieving stable integration that a mixed, both racially and economic level development is preferable than one that's devoted exclusively to low income or minority populations?

A. Generally speaking. I think the key issue is that the neighborhood should be mixed income in a way that the potential low income population or minority population is not likely to become the dominant population in the neighborhood. I think that's the crucial element in terms of stable integration.

I think for — that means if you were to put a [311] small development within a relatively large neighborhood, in all probability you could — that development could be entirely low income as long as it represented a small part of the neighborhood that it was a part of. If you were developing a large development that was likely to be a significant part of that neighborhood's population or conceivably even create a new neighborhood, then that development should be mixed income with a majority of non-lower income occupancy.

Q. You would agree, though, as a general matter, and it is your preference, isn't it, that a mixed market development would be better received and better able to integrate into the surrounding neighborhood than one devoted solely to low income units?

A. Again, that varies, but I think that's likely to be the case.

MR. ABRAM: No further questions, your Honor.

THE COURT: Mr. Weaver?

CROSS-EXAMINATION

BY MR. WEAVER:

Q. Mr. Mallach, at your deposition you were asked precisely what you had been instructed to do in connection with your retention in this case, and your response was that your role was to advise the Justice Department attorneys on different possible elements, approaches, [312] alternatives, so forth that might be applied in the course of framing a remedy for the Yonkers litigation. Is that still the case?

A. I believe so.

Q. In your consideration of appropriate housing remedies, have you considered the effect of any of these proposals on the existing schools in Yonkers?

A. Not in detail. I did review subsequent to the deposition and prompted by your questions at that time, I did review the annual school profiles for the city schools to get a general idea as to whether capacity appeared to exist in the schools in the general vicinity of the major sites under consideration.

Q. How many students and/or children would you anticipate your proposal for the use of the Whitman site would generate if 400 units were built there?

A. If 400 units were built, the number of school children would vary enormously depending on at least three different factors. One would be, and the most important one, would be the bedroom mix of those units, how many were two bedroom, three bedroom and so forth. The second would be the physical type of those units, flats, town housings, single-family houses and so forth, and the third would be the price level of the units.

So before one could come up with even an [313] estimate of the number of school children, one would have to have a reasonably detailed development program for the site.

Q. What is your estimate of the racial mix of the children that that site would generate?

A. I have no idea.

Q. In your examination of the census data, did you determine the number of whites in Yonkers who would be eligible for subsidized housing?

A. No.

Q. Did you determine as you did in Exhibit 2 for black households, where 30 percent or more of the income was spent on housing, the same type of data for white households?

A. Not specifically. I looked at it.

Q. Did you determine from the data how many families in Yonkers live below the poverty level?

A. The data is in the census. I don't recall what it is offhand.

Q. Is it your impression that there are many more white families in Yonkers below the poverty level than black families?

A. Yes.

Q. And indeed, on Exhibit RH 3, Government Exhibit RH 3, the number of persons or households in substandard [314] conditions, some 78 percent of those households are white; isn't that correct?

A. I believe it's more like 73 percent, but I may be wrong.

Q. That's close enough. Now, having been qualified as an expert witness in this case to opine as to the appropriate remedy, can you tell me what process you undertook when you first were approached to do this task as to what condition it was that you were attempting to remedy?

A. Well, the principal thing I did with respect to that, in addition to discussing it with counsel, was to read a substantial part of the judge's opinion with regard to liability.

Q. All right. And what specific things did you get from either of those sources that you used as a guide to developing your remedial plan?

A. My understanding from both sources is that — and again, this is with respect to the housing aspect of the case — that the issue was that over an extended period, Yonkers had engaged in racial discrimination with respect to the location of subsidized housing developments. That was the central issue that I focused on in terms of trying to arrive at an approach to remedy.

Now, it seemed clear that given the extent to which Yonkers had developed since the discriminatory [315] practices had begun, that it would not be practical to go back 30 or 40 years and try to reconstruct a hypothetical as to how many units of subsidized housing might have been built, either in the city as a whole or in the city outside southwest Yonkers in the absence of racial discrimination, because even if one could come up with a hypothetical number, the great majority of sites that had at one time or another been contemplated for subsidized housing projects were no longer available for that purpose.

Appendix 4

So, then, again following that concept further, there was a need to develop a conceptual approach to arriving at a plausible remedy that still dealt with the nature of the liability but that recognized the realities of Yonkers today in terms of economic conditions, site availability, available subsidy of resources and so forth. So that's essentially what I pursued.

Q. During the course of your reading the court's opinion, you were not struck by the indications that, one place or another, that the housing remedy would be developed with an eye toward improving the racial integration of the schools?

A. I saw that that was part of it, Yes.

Q. What consideration have you given to — strike that.

Who in your view were the victims of the [316] discrimination that the court found in its opinion?

A. With respect to housing, principally low income minority families or households.

Q. All minority family households?

A. I really can't answer that.

Q. Do you think that the people that were living in southwest Yonkers, minority family households, were more affected than minority family households in some other location?

A. Yes.

Appendix 4

Q. What consideration have you given in your research into an appropriate remedy, to a remedy aimed at the removal of the vestiges of the discrimination found to have been suffered by those minority families in southwest Yonkers?

A. I think the key element is the combination of housing production affordable to such families outside of southwest Yonkers, coupled with effective affirmative marketing to create the greatest possibility that families in need living in southwest Yonkers will take advantage of those units.

Q. As I recall, you indicated that persons who already have adequate housing will not be likely to move because similar housing is available some place else, is that —

[317] A. That's correct.

Q. Do you have any suggestions as to how minority families can be — we can assure their being recruited to occupy some of the units that you proposed to be built?

A. I am not sure there are any ways to insure that they will occupy the units. I think they make up a substantial part of the housing need. I think it's certainly legitimate, even desirable to give priority to new units to families with housing problems, be it affordability, overcrowding, living in substandard housing and the like.

Secondly, I think it is necessary to provide, again, through affirmative marketing, active, effective outreach to neighborhoods and the communities and the organizations which can most effectively reach the population who are the minority families in the substandard housing conditions.

Q. And we have determined that 73 percent of the people living in substandard housing conditions are white?

A. That's correct.

Q. What would your target area be, where would you target the affirmative marketing?

A. Largely in southwest Yonkers.

Q. Would you go outside of Yonkers?

A. I really hadn't thought about that. I don't [318] know that it would be necessary. I think there is a — the pool of need in southwest Yonkers is likely to be adequate for what are likely to be a realistic number of units to be produced under the program.

Q. Would you favor a preference for residents of southwest Yonkers, particularly minorities living in substandard housing?

A. I'm not sure. I can see some arguments on either side to that.

Q. I think at a couple of places during your testimony you indicated that there was some danger, at least, of either having the units proposed to be constructed renting up all white or getting very few minority residents; is that correct?

A. That's correct.

Q. If the units rented up all white, that would have no effect whatsoever on the remedy of this case, would it?

A. Exactly.

Q. So we would have done all of that for nothing? I mean, the people that lived in it would think it was nice, but that's not related to this case?

A. That's correct.

Q. Don't you think we need something to guarantee that when we get done we are going to have remedied the [319] violations found here?

A. Well, I am not sure. Again, guarantees, regrettably, are often very difficult to come by in this world, and very often require trade-offs in terms of other things that are also problematic and, again, whether it would be appropriate essentially to create — the only way you could guarantee minority occupancy or substantial minority occupancy in these developments is by essentially creating racial conditions for occupancy, and I think there are some fairly compelling arguments why that might not be a desirable undertaking for other reasons.

So I think what you are trying to do is walk a tightrope between encouraging a high level of minority occupancy but at the same time avoiding something that would be tantamount to a racial test for occupancy.

THE COURT: Well, I think you have to tell me what you mean by affirmative marketing. I understand

what you mean in terms of public relations and advertising and community meetings and so on, but does it go beyond that?

THE WITNESS: Well, it might. I think one thing you might want to do, for example, is to the extent that you were creating low income units or units affordable to very low income families, you might — and there is already an existing waiting list of such households under the public housing program, you might give priority to those [320] families.

I think by giving priority to families living in substandard housing and overcrowded housing, you are doing something which would potentially increase the size of your black — the minority pool without, again, having an explicit racial criteria for occupancy. So I think there are certain things that might go somewhat beyond the publicity and the promotional aspects, but I would be reluctant to go too far beyond that.

Q. You would agree, would you not, that the focus of the task before the parties in the court here in the housing portion is to remedy the constitutional violations found rather than creating general housing opportunities for low income people?

A. I don't think it's an either/or situation. As I have testified earlier, I don't know that it's — that an effective remedy of those violations is possible except through the creation more generally of low income housing opportunities.

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[321] Q. Did you give any consideration to preferences being granted to majority families for occupancy in currently existing subsidized housing in southwest Yonkers?

A. No.

Q. In your opinion, if a housing development or unit in southwest Yonkers is occupied by 100 percent minorities, is that something that should be addressed in this housing remedy?

A. I think it is an interesting question but very much a secondary one. I do not believe as a general proposition that integration is well served by actions that are designed to reduce the pool of units available to black and other minority families.

So for that reason, as a step in framing the remedy, at this point I would certainly consider it inappropriate. I think certainly in the long run, if it could be done in a way that does not reduce the housing opportunities available to black families I would certainly not only not object to but actively support a process which would effectively racially integrate existing subsidized housing in southwest Yonkers, but not in a way that would reduce the pool of housing available to minority families.

Q. At one point you indicated that the victims of discrimination were lower income households and that they should benefit from the remedy to be adopted here. In your [322] view were you talking about both white and minority lower income households?

A. No. I believe I specified that we are talking about lower income minority households, principally in southwest Yonkers.

Q. How does a minority lower income family in southwest Yonkers benefit from the construction of a low income housing unit that is to be occupied by a majority tenant on the east side?

A. I am sorry.

Q. You had indicated that there is a distinct possibility, or a possibility, that all of our units that we build under the proposal will be occupied by majority residents, whites. I would like to know how we have helped the discriminated-against minority in southwest Yonkers by doing that.

A. I think my testimony was that in the absence of any steps for affirmative marketing, for encouraging minority occupancy, for any other measures that might be taken, where rent-up of new units is allowed to take place, largely through word of mouth and neighborhood sources of information, there is a significant risk that the development would be largely or entirely, almost entirely, nonminority.

However, my reason for saying that, of course, [323] was to stress the importance of having affirmative marketing and other measures to target minority occupancy, and I am confident that that will be part of a responsible plan developed by the city.

* * *

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[894] [May 2, 1986]

* * *

THE COURT: Ms. Vanderwicken?

MS. VANDERWICKEN: Your Honor, I would like to first address the question of the scope of the violation and therefore the scope of the remedy.

The government's position is that the violation here is one where by its actions the city has maintained a segregated city, and it did so in conjunction with private discrimination that had already begun that process but was exacerbated by the actions of the city, that if the city had not conducted its housing program as it did, there would not be the condition currently existing of the vast bulk of minority families living in one quadrant of the city and three quarters of the city being much more largely majority.

And along with that, the victims of this violation are the whole city. The whole city now lives in a segregated condition. The minority population for the most part lives in an area which has numerous majority people, of course, but they are prevented from living elsewhere in the city, and the city as a whole is segregated and identifiable in terms of areas that are available to people on the basis of race.

Therefore, the remedy should include some [895] actions that will go to changing that situation and insuring that it does not continue and will not be repeated.

Now, first of all, that requires a very strong and effective fair housing program, and that, as Ms. Hanson was talking about, should address both the private discrimination and actions by the city that have and might otherwise continue to be productive of a segregated condition.

Now, Mr. Sussman and the NAACP are proposing that that fair housing agency be an independent agency. The government's position is that it should be able to function with sufficient independence, that it is able to do its job effectively, and that would require some controls over the city's discretion in staffing and it should require strong monitoring which we suggest be done by the government, but nevertheless there needs to be strong monitoring of what the agency does —

THE COURT: By which government?

MS. VANDERWICKEN: Well, by the parties. There needs to be effective enforcement of the fair housing laws and that that should be supported by the city. Now, that can happen in different kinds of ways. Ms. Hanson talked about one way, and another way I suggested in my examination of her which would be the city helping to fund another agency which did that aspect of the fair housing [896] effort.

Now, in terms of the framework for the 200 units of public housing, that is one of the major and most immediate points of contention, obviously. The city has continued to propose the development of the Yonkers Avenue and Tuckahoe Road sites which we believe the evidence is fairly clear are inappropriate even in a configuration of 80-20 proposed by the city.

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The city's own witness, Mr. Efron, testified to the inadequacy of the rear portion of the Tuckahoe Road which is the only portion that would be amenable to the 125 unit configuration, and Mr. Pistone, the city's planner, agreed with our expert that both sites are isolated and not in any existing neighborhoods, and we believe as such that they are really inappropriate for remedy in this particular case, even though in the abstract Yonkers Avenue, for instance, might be a perfectly good site for conventional housing.

In terms of public housing, in terms of the city's having sought to isolate public housing from white neighborhoods, it is inappropriate, in terms of the city's condo and co-op plan, that might be appropriate even as —

THE COURT: What's your view with respect to the 200 units in August? What's the government's view with respect to the appropriateness of a mechanism in the event [897] that at some time just prior to August the city council fails to designate two other sites?

MS. VANDERWICKEN: Well, your Honor, we would go further than what you suggested earlier, and that is, we think that the record now shows that there are some appropriate sites or potentially appropriate sites. Three school sites have been identified, have been reviewed by our expert, the Whitman, 15 and 4. Mr. Pistone identified several sites that are still available and which he has reviewed and has found appropriate for public housing.

Now, whether or not HUD would, we don't know, but those are — that's the universe of sites that we now have

evidence of that should be the sites chosen, and we would submit that the city should either be directed by the court on specific of those sites or be directed to choose among those sites some combination such that all 140 units are not on any one site and submit that, those proposals to HUD with the necessary documentation within a very short time period.

As everybody knows, HUD does not move quickly, and there is not even any guarantee that they would move by August, and so any time that is wasted in this effort is very dangerous to the possibility of obtaining that CDBG money.

(Continued on next page)

[898] THE COURT: What you are suggesting is that there be an order which says appropriate sites acceptable to HUD are to be designated by July 1, if the city council shall not have approved such sites by that date then all of the sites listed on Mr. Pistone's list are to be deemed submitted to HUD by the city of Yonkers and HUD make its selection?

MS. VANDERWICKEN: No, I don't think that can be the way, your Honor, because HUD has to deal with specific proposals and numbers of units and so on.

THE COURT: Who is going to make the selection from that list?

MS. VANDERWICKEN: We will have this more worked out by the time we present our proposed order next Monday, but I think the outlines should be that way before July 1, I would think between the date of the court's order

and three weeks afterwards the city should identify sites which could include only those three school sites — let me just say parenthetically, of course, that Whitman should be immediately returned to the city. That would be not necessary to this but is part of what we would ask for.

At any rate, that the city should designate sites, that any sites that are privately owned should be designated only if they can get the agreement of the developer or owner of that site to have it developed in a [899] turnkey manner in some proportion, at least, of public housing units. If the city had a developer — in fact, we think that there may well be developers that would be interested in this from other information we have. If the city can get a developer who would be amenable to developing 80/20 type configuration on a site such that some percent are public housing units and some percent are conventional, that would be fine, if it meets the strictures that Mr. Gelletich noted in his deposition in terms of the kinds of agreements that have to be made between the Public Housing Authority and a private owner.

A very short time period should be given for getting that taken care of, getting the documentation prepared and getting the sites off to HUD to be reviewed.

If the city does not make some selection within that list by the time given, then I think it is going to have to be up to the court to do it.

THE COURT: To pick the sites?

MS. VANDERWICKEN: From among those listed. And given the fact that the only sites that the city really would have control over are the school sites, then it pretty much limits it to that, unless the city can produce other evidence.

That seems to be the way it has to go, your Honor, in terms of meeting the deadline that we are up [900] against.

THE COURT: What is the government's view as to the appropriateness of setting a goal for units beyond the 200?

MS. VANDERWICKEN: There again we will be a little more specific Monday, your Honor. Generally, we think that there should be an inventory of the type that has been discussed, that preferably that be done by the city, preferably through some independent contractor arrangement or possibly by a court's expert, and that the unit goal not be determined by that person who conducts the inventory but that the inventory provide the basis for a goal then being determined bite the court.

THE COURT: What is that inventory going to tell us that we don't know? If we accept Mr. Pistone's evaluation of the 10 sites on his list and we add to that the schools, since those schools are not on his list, doesn't that tell us that there is enough vacant land in Yonkers to accommodate housing in excess of any goal the court might reasonably set?

MS. VANDERWICKEN: Not necessarily, your Honor, because we have already been talking about the problem of land being developed otherwise. Most of the sites on

Pistone's list, except for Lincoln High School and school 4, are privately owned, and a couple of them, I believe, are [901] already zoned appropriately for multifamily housing and those might be developed for multifamily housing, others are zoned for other uses and may well be used, unless there is the kind of moratorium or some kind of —

THE COURT: Obviously it is a factor, but it seems to me that to say that the first inquiry isn't how great is the need or how much must be done to provide an adequate remedy in light of the violation, or what is the fiscal resource, but to begin with how much land do we have available. I know that is the traditional way in which it has been approached in Yonkers. I am wondering whether it is indeed the appropriate way.

MS. VANDERWICKEN: The reason we believe it is, your Honor, is because the scope of the violation is so great and because there is no way to calculate the number of victims or who the victims are, and because sites have been being swallowed up. We believe that if we were operating with a somewhat cleaner slate and with more sites available and so on, and if there was some way to calculate the number of victims that number would be greater than the space available, essentially. So that we are not talking about an appropriate remedy being less than the sites feasible but really an appropriate remedy would be more than what we can do.

So in order to accomplish as much of that as [902] possible, you need to identify really what the whole realm of possibility is, and make the assumption, which I think is valid based on Mr. Mallach's testimony and common sense, that certainly not all of the possibility is going to be realized.

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I would just like to say, I was going to say that Mr. Mallach testified to that and Mr. Sternlieb did also, in his deposition. He was asked how do you go about identifying a unit goal and he said you look at the feasibility, you look at the sites, you look at what the whole situation is, and that's how you do it.

In terms of financial feasibility, your Honor, we believe that can really only be determined — that shouldn't be brought into the determination of a unit goal because that can only be determined once you get started. Mr. Mallach was very clear that there are a number of techniques that can be used for developing housing, that once you have the goals set and once you get about the business of doing it, you can start making use of.

There are really so many different ways that that can happen, that it is inappropriate to set up a limit based on some kind of hypothetical number of available dollars at the beginning of this process.

What really should be done is to look at the sites, determine the number of units that are basically [903] stretching the feasible, as Mr. Mallach talked about, and then going about to see how to get the financing for that and see if it is possible. It may be that sometime or other the city is going to have to float a bond to be able to purchase some land that might otherwise slip away, to be necessary to maintain some kind of balance in an overall remedy. But that doesn't have to be done yet. The financing of this can be made flexible and looked at regularly over time to see what is essential here.

The 10 percent incentive, the 10 percent of the CDBG funds we think is really inadequate as an amount. It is not clear that there is any set number, but we have on the basis of the amount of dollars that would be available proposed that two thirds of at least the first two years of CDBG, grant years that have not yet been received by the city be basically incorporated into seed money for this housing trust fund, and that if not that high a percentage, some gradually decreasing percentage of the CDBG funds on the following years be put into this fund.

THE COURT: If you are putting two thirds into the trust fund, is the trust fund only for the creation or acquisition of new units?

MS. VANDERWICKEN: Or rehabilitation. We would think that the trust fund money really should be used for the nonsouthwest side housing, which is one reason why we [904] don't propose taking 100 percent. Clearly, some substantial amount should still be retained and used for rehabilitation and development of the southwest side, and one third — I haven't really figured it out exactly, but clearly the uses that the city has made of CDBG funds in the past has certainly not all gone into rehabilitation, and one third of that grant would be a hefty amount, if that was directed specifically to rehabilitation in the southwest side. And gradually, after the first two years, as a smaller portion of the grant went into the housing trust fund or the housing development part of this, gradually more could go into the rehabilitation of the southwest side.

Plus, your Honor, the point has been made before that the city has every incentive to develop and to encourage the

development of the southwest side. It has clearly been something that has been on the agenda of the city and has been for a number of years. Those efforts are beginning to bear fruit. There is some new development coming in. There is looking like fairly good possibilities of some commercial and conventional housing along the waterfront.

The city already has built-in incentives to work in that area. It has no incentives to work outside it, in terms of available housing to low and moderate income [905] people.

So to the extent that there is this source that can be used, that does not put the city itself in any jeopardy. That money is not anything that is dependent on currently for ongoing city services. That should be used in large part at this point for that which the city would not otherwise put any effort into doing.

In addition, the city has shown its willingness in the past to exercise various powers, eminent domain, zoning powers, tax abatement, etc., to make housing possible in the southwest, and has shown its willingness to use those powers for this remedy. In fact, it had essentially agreed to use its power of eminent domain to buy the motel, for instance, on the Yonkers Avenue site, to make that site available for its proposal for that site in its decree.

In addition, it recently used its eminent domain power to make available to the conventional development on the waterfront some sites. So that that is not something that is out of the ken of what this city has at its fingertips.

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Those kinds of powers should be used and should be exercised to facilitate low and moderate income housing in this decree and the court should require it in the proper circumstance.

[906] The city has indicated that its financial straits, its financial difficulties and the constraints it is under, including review by the emergency financial control board, militate against imposing any additional financial burden on it in order to remedy the violations found by the court. Testimony and the documents submitted into evidence show that the structure the city is operating under, that is, the periodic revisions of a four-year financial plan, which are reviewed and revised periodically, allow for the city meeting a variety of operations arising from litigation of various types and if in order to provide an adequate remedy that meets the violation found in this case, the city needs to incur an additional burden, then that simply must be factored in. It was certainly aware of that possibility and the potential burden when it went ahead with the bond issue in December and included in that bond issue that obligations for the police facility, for instance, which, while may have been certainly one of the things that the city would like to take care of, was not an absolutely pressing, number one consideration.

The city needs to increase its tax base, no question about that, and it is doing so. There is lots of new industry and new commerce coming into the city. As I mentioned, the new Shop Rite and the waterfront development on the west side as well as new apartments are coming in. [907] The bond sale itself did better than was expected. It sold in two days and had a good mix of institutional investors. It is not at all clear that another bond issue would not similarly do well.

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The full assessed value of property in the city is rising and the tax rates in relation to that are in fact falling, although they are going to rise, obviously, in response to the bond issue.

There is no evidence that with the increase of income taxes and sales taxes that people have been driven away, nor that they would be with some incremental addition.

There is also evidence that the city is trying to get the school district made independent, and with the full knowledge that that is going to severely increase the tax rates that people are carrying, and that does not inhibit it from going ahead and attempting to effect that change.

Several city officials have testified that there has been great loss of revenue from certiorari actions, and that large amount has been lost due to the need for — well, if the city conducts a reassessment of its property, which there have been various indications have been both considered and deemed necessary, that will provide a rationalized basis for assessment and will diminish the loss of assessments from certoiraris.

[908] There has been testimony on a variety of ways that new housing can be provided. These include the kind of mandatory inclusionary ordinance your Honor was talking about. I think it may be true that that may not work so well in a city that is not the subject of tremendous pressure for increased development, but it is a tool that could be used, and particularly it could be used with city owned land. The school sites could be made available to developers free. I think it would be very reasonable.

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THE COURT: I was thinking it in terms of the publicly owned land.

MS. VANDERWICKEN: In return from some kind of inclusionary development, and that makes an awful lot of sense in this city.

Also, density bonuses, as Mr. Mallach talked about, are a method for really encouraging beyond what would be available from the CDBG money. That is really what fuels developer interest, is the increased profits that they could get through density bonuses.

And then particularly if there is a nonprofit form, the internal subsidization is a feasible method of development, as well as the use of the IDA bonds that particularly Mr. Martinelli talked about. However, the reliance on the IDA bonds, which he indicated were a more substantial incentive than the trust fund, is inappropriate [909] because that is really not an agency that is under the control of the city, and while that may be something that can be looked to as a possibility, it is certainly nothing that can be relied on to insure the development of housing.

The city has talked about the inappropriateness, Mr. Sculnick just talked about the inappropriateness of limiting private development on land that is not owned by the city, but I would point out that zoning, the whole concept of zoning is a limitation on development for purposes that the city deems reasonable and necessary, and that any kind of limitation such as zoning is a reduction of total free market ability to develop land as an owner would like to.

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And in addition I would like to note that Mr. Pistone's sites, which as a city official have some imprimatur of the reasonableness of developing sites not currently zoned for multifamily housing, most of the sites on his list are not currently zoned for such housing.

And further, in addition, Mr. Mallach testified that in developing an inventory of sites that would be appropriate for multifamily housing you would initially exclude from that list sites that would be more appropriately used for commercial and industrial development. The city zoning map has areas that are zoned for executive parks, etc., and it would not be reasonable [910] to include those areas that have already been identified as likely targets.

In terms of a home ownership priority in the remedy, I don't think any party disagrees that home ownership has some value and that to the extent possible it would be reasonable to include some home ownership units in the decree, but for the public housing part of it in particular, the city's proposal for the co-op and condo units is inappropriate, number one, because the time limit, the city is proposing 150 of those units to be used in these isolated and very scattered condo and co-op units, which they have provided no evidence whatsoever are available. As the entire remedy is shaped and as time goes on, to the extent that such units are identified and can be made available, either through the MHA or through the city, that would be totally appropriate, either as ownership or as rental.

And finally, your Honor, there is the general question of deference to local control and local initiative over the

setting of a number of units to be built and the process by which they are to be built. The government basically believes that such deference is appropriate to the extent that the city is under a firm obligation to fully remedy the extensive violations found in this case, and to the extent it shows itself willing to fulfill that [911] obligation.

Thank you.

THE COURT: Thank you.

Mr. Sussman.

MR. SUSSMAN: Good day, Judge.

On behalf of the NAACP, again we find ourselves at points of disagreement with some of the suggestions of the court, and also, I think, certainly with, more primarily, the views of the city of Yonkers. I think the easiest way, however, to explain the position and support it is to divide this argument into three segments.

Really, in my view, your Honor, there are three basic issues that this court at this point, and not at some later point, must determine, and I understand that as in the school part that is a substantial obligation and responsibility of this court, and I don't suggest these responsibilities lightly. I understand the court and the Constitution's concerns with federalism and local autonomy and authority. But that concern, as the court itself has recognized, is modified by constitutional considerations which are clearly implicated, not only in this case but at this time in this case.

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It seems to me the argument in this matter really relates to three specific issues. One is what has happened in the city of Yonkers in the last three years. [912] Of course, this court stopped taking evidence, as it had to at some point in time during the liability hearing, and events have continued to transpire in the city, and for the court and the parties, as has apparently been done up to this point, to ignore those three years or act as if they don't shed light on the city seems to me to lose an important opportunity.

Second, there has to be an analysis of the proposal made by the city. As with the school board, in a case like this constitutionally the defendant has the first responsibility and obligation to formulate an appropriate remedy, to submit it and justify it to the court, to of course have it scrutinized and evaluated.

And only third, if it is found wanting, is the court in a constitutional position to evaluate alternatives proposed by the parties.

I do believe that proceeding in that manner with argument will better elucidate the issues in this case than seeking in a sense at random to pick on a different issue here and a different issue there. I think they fall into an organizational perspective.

The NAACP's position is this: There has been a continuing violation by the city of Yonkers since the liability phase of this case and since the hearing ended. Indeed, as the evidence is made clear, the very same [913] instincts

and motivations have continued to control the municipal authority with respect to housing and zoning, as the court in its extensive liability finding made clear.

In my judgment this cannot be excused by the pendency of this litigation. In fact, common sense counsels far to the contrary. As Mr. Doran, the city corporation counsel, said publicly many times in the last three years, the city had every reason, through its municipal officials, to act responsibly in this period of time, to submit reasonable sites, to amend its HAP, to take actions which would have in some sense cured, at least symbolically, the various violations which this court found.

Indeed, the entire exact contrary occurred. Given every opportunity, and I think that is the only appropriate standard, the city of Yonkers through its officials took actions and omitted, in a manner totally consistent with the pattern of 40 years that this court found, and it seems to me that that is very significant in giving rise to what kind of order is now appropriate.

Just to review the evidence very briefly, and I don't want to prolong the agony, because in fact it is very agonizing for all parties, I think, to recognize the continuation of these practices, because it in a sense points to the futility of the litigation exercise. But the evidence shows that with respect to the issue of section 8 [914] existing certificates, political figures understood there was a need for these certificates in the city of Yonkers, The city's own HAP showed that. The city's own planning expertise indicated that. In fact, there was no counter-indication anywhere that I am able to see on this record or through my perusal of city documents.

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There is an extraordinary difficulty for low and moderate income families getting housing and this can be assisted by the subsidy programs provided by the section 8 existing certificates. Yet when those certificates became available to the city through the consent decree, and it later became clear through this court's opinion, not through, my understanding, frankly, the time the settlement was negotiated, that a HAP amendment was going to be necessary, that of course being a position taken by HUD, the city was given an opportunity of some seven or eight months to amend its HAP to allow for the expeditious use of the certificates.

What happened? No consensus could develop, there was strong opposition among east Yonkers council members and the HAP was never amended. The certificates have just now, some two years after the consent decree, started in use in Yonkers. This was not through any fault of the Public Housing Authority. That authority in June of 1984 submitted the appropriate application to make use of [915] these certificates, evidencing, of course, its understanding of their need.

Turning to the next issue which I presented issue on, we talk about the HAP in 1985. The city officials, of course, some of them still disclaim knowledge of the most elemental issues, even though they have been on the council seven or eight years. But taking that for what it is worth, clearly there was knowledge that the HAP had to be approved in order to be eligible for CDBG money. Mr. Oxman stated quite candidly the same kind of political pressures that had long been found by this court to exist dissuaded the council from approving the HAP. So in fact the city of Yonkers remains

ineligible for CDBG money because it has not taken the most elemental step in the process, showing basic respect for the Community Development Block Grant program.

So the third matter, of course, is with respect to the two sites, and perhaps it is the matter least in need of discussion, given the city's statement in closing. I am not even sure the city at this point is advocating these two sites. But two days after the sites were proposed, having witnessed the course of events which led to their submission, I stated on behalf of the NAACP, publicly, that these sites were in fact sites of exclusion, that other sites which were available in the city of [916] Yonkers and known to all in the city of Yonkers as appropriate, including the planning department, the Municipal Housing Authority and others, were not being even considered under any rational basis, that the planning director of the city had been excluded from the process, that no rational process was meant to exist.

The situation was entirely one, as Mr. Oxman alluded to, in which sites were suggested which could meet one test, that is, getting votes from the city council, and that, your Honor, is not an adequate test when the result of it are sites that by environmental standards and by neighborhood and site selection standards are simply inappropriate.

Why it took HUD some 20 months to finally deem the sites inappropriate, I share the frustration of Mr. Martinelli and Mr. Oxman. The timetable was entirely responsible in light of the factors that easily could be discerned through a view of these sites.

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In any event, the sites have now been rejected and the city now continues to propose the sites for utilization in the remedy, quite obviously to me, because politically it was impossible to provide any sites to this court which might be considered for any form of housing. That is the reason why in February these sites were again raised, not because the city had a lack of knowledge that [917] they had already been rejected by HUD. Between December and February, no other sites were considered, notwithstanding Mr. Pistone's list of 1984. He was never even consulted.

So at some point, it seems to me, the court has to take clear cognizance of this pattern of events, and while of course I would like to share the optimism of the court that given another opportunity the city of Yonkers would be more responsive to federal law and to good civics, it doesn't seem to me that there is any evidence on this record or any evidence in the sequence of events that I am aware of which would give any reason for that.

The only thing that gives reason to it in a view towards, in a sense, judicial discretion to municipal officials. But as I say, that instant, however justified it is and rooted in our constitution, has limits, and this court, it seems to me, has shown extraordinary patience with the city of Yonkers, with HUD, and has found, for example, in the testimony of Oxman, McGovern and Martinelli, that notwithstanding clear notice that these sites were unacceptable starting in December 1985, absolutely no process was put in motion to find new sites.

Only one reason for that appears clear on this record, and that is that there is no will in Yonkers, in fact, there is a

contrary and strong countervailing will [918] not to disgorge sites, if you will, and this has nothing to do with whether there are sites, it has nothing to do with finances. It has to do with the same factors that this court clearly found to have existed over a 40-year period in the city, and that is racist, and while it may be impolitic to call that what it is, that is what it is. When politicians in the city of Yonkers say there will never be subsidized housing in the east side of the city, there will never be public housing, as they continue to say this minute, they are in fact in contempt of the court, in contempt of the Constitution and in contempt of their assurances to HUD, whether they are personal assurances or municipal assurances.

It seems to me high time that the court, frankly, recognize that this is the animal, if you will, that is being dealt with. We are not dealing with people who will voluntarily, as much as we wished they would, change their course of conduct. They have made too many political speeches and too many promises to their constituents, and they are not about voluntarily to cease this course of conduct.

Then, your Honor, what we are left with, that being recognized, is the question whether, by a divided vote, understanding the forces in the city council on the one hand, the city has the will to find other sites, and it [919] seems to me the last several months offer a clear demonstration that it does not. If that is the NAACP's view of the sad history, and quite honestly I don't think the record allows for any other conclusions — neither of the parties addressed that part of the record but I don't see much basis for optimism.

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The other thing I would mention with regard to that are the factors that went into the development of this remedy proposal. I think that is a reasonable basis for inquiry in deciding whether that proposal, for example, offers a countervailing and positive mood or positive evidence to that which I suggest to be the reality, and frankly, your Honor, I think the evidence again shows that this proposal was made without the least bit of objective, rational consideration.

You as well as all of us heard the evidence with respect to the condominium cooperative proposal. The reason that proposal was developed is very simple. If you are going to 80/20 and you only have two sites and the sites have a limited capacity, you are left with 150 public housing units. You are left with them because they don't fit on those two sites.

What do you do with them? You could come up with another site but that implicates all the political problems that I have already referenced. So what you do do [920] is suggest some program which in fact has very, very mixed history nationally, has been for the past 15 years in disfavor with HUD, which has no track record in the city of Yonkers, which is presented with absolutely no justification.

No one came from the city of Yonkers to explain the proposal, to really give credence to it. No city official explained where it came from or what its basis was in fact. And you present that to the court.

If that is not bad faith in this case I honestly don't know what would be. It seems to me it is terrible faith and it does not indicate any reason for optimism with respect to the city.

Appendix 4

I have already touched on some of the city's proposals and indicated our view of them. Let me quickly move to those that I haven't referenced.

THE COURT: Before you do that, and the conclusion drawn from that in terms of, for example, the two sites, is what?

MR. SUSSMAN: With regard to those two sites, obviously they should be rejected. The conclusion with respect to the issue of how the court is to proceed with the 200 units of housing, it seems to me the court has really two and only two choices. One is it can direct the city within 30 days to submit to the court and to HUD sites. [921] It seems to me that this has to be a court order. I disagree entirely with the city, in the sense they say that this is something between them and HUD. It is not. It relates to the remedy of what this court has found.

THE COURT: But what you are saying then is that the city should be given a period of time, you suggest 30 days, in which to designate two sites.

MR. SUSSMAN: Yes, but the understanding has to be very clear, your Honor, that should they not do that the court has to select sites, and if the court desires an expert or a master or some other mechanism of assistance to help the court decide which among sites which have been vouched appropriate are best, then obviously the court is entitled to that, and we certainly support the court in seeking that kind of assistance, should it be deemed necessary.

I don't think, frankly, it is the NAACP's position to tell the court that is or is not necessary. It may be in my view, given the record, it is not necessary, that the court would be justified in saying Whitman, school 4, school 15 are in fact appropriate sites. But the fact is that the court has to feel comfortable, I would believe, making the ultimate judgment, and what evidence the court feels is necessary to do that is obviously known, it seems to me, best to the court.

[922] The point is, the city has to understand that there is going to be, through judicial intervention, the selection of sites, just as city officials have been warning, and not simply have the perspective that at this point it can choose again getting CDBG money and selecting two sites, which to me, your Honor, is exactly the choice suggested in a sense by Mr. Sculnick. That is, the way it is left now is the city can forfeit the funds or the city can come forward with sites which HUD deems appropriate. My reading of the city at this point, it is obvious what would occur. The city would simply forfeit the money, and at that point we are in August and is the NAACP at that time going to come back for an order? It should not have to. That should derive from this proceeding. After all, those 200 units, whatever their exact source and HUD conditioning, also relate directly to the remedy of the violation found by this court, and the court has an interest in seeing that the CDBG moneys are used on the one hand and that the federal moneys are used on the other band.

(Continued on next page)

[923] MR. SUSSMAN: Now, that leads to in a sense the second issue, and just so it is entirely clear in this record,

our position with regard to the 200 public housing units is that they do derive from HUD conditions from a determination by HUD that rental units of housing for families are necessary in the City of Yonkers in light of the city's HAP, in light of its needs, in light of the historically unmet goals, and that to try to convert those into owner occupied units or to try to convert them into moderate income units or some other form of housing seems to us inappropriate.

In other words, the city should not be allowed, if you will, to finagle and convert that obligation to any other, which is, of course, what it is trying to do. The 150 co-op/condo proposal, as vague as it is, as time unlimited as it is, seems to me entirely unresponsive to the need which has been identified in the consent decree and is clearly responsive to the remedial issues in this case.

Now, the second matter that's before this court, quite obviously, beyond the 200 units, is what else? And again, unsurprisingly, the city's position can be summarized as we will put into place certain, what I would consider highly inadequate subsidy programs, and if developers utilize them, okay, if they do not, okay. And I [924] think the structure of the argument is important here, because what is being said is there is an opportunity issue; we rejected barriers, we are now taking the barriers down, if anyone comes in, fine. But this court, as Mr. Sculnick argued, does not have the authority equitably to do more.

Now, it seems to me that argument has been — it has to be confronted directly, and I believe it is wrong. This court

has the equitable authority in light of the violation of the City of Yonkers to in fact order the city to insure through available financing techniques the creation of a discreet number of units of housing.

It seems to me that's indisputable, because the city in fact blocked for racial reasons the construction of numerous units, numerous sites in east Yonkers, and the court's opinion which carefully recites the round-by-round blocking of east side sites gives clear predicate for that kind of an order. So the notion that because the court did not state a specific number of units were blocked, therefore the court is not allowed to set a number, seems to me not to be properly based. The court found the general pattern and practice which existed and which in a sense kept all units out and pushed them in another part of the city.

Now, the question has been raised as to what sufficiently predicates the setting of the goal beyond the [925] 200. The government's position is that a process should occur which will inventory available land and then apparently, based on the results and the resulting prospective on how much land is actually available, would set a goal. The city, as I have already indicated, would simply set no goal and would leave in a sort of laissez faire market manner the production of this housing.

Our position, your Honor, is somewhat different. We believe that the setting of a goal is essentially a matter of judicial discretion and prudence, taking into account the violation, the sites and some basic judicial judgment. Again,

I don't see — in the City of Yonkers, just to take this as an example, there are numerous park lands which if we brought the map up could be displayed.

One could make arguments, your Honor, that certain segments of this park or that park are inadequately used and therefore should be chopped off from the rest of the park and be used for housing. One could argue that the Theresa Avenue site near Lincoln High School, three acres versus eight acres, should be used for housing. One could argue with respect to the Whitman school how many acres of that school should be used for a buffer between the single family zones, how much should be used for housing.

It doesn't seem to me that an inventory really does us very much good. What would do us considerable good [926] is simply the exercise in light of the evidence in this case, in light of the financing mechanisms available, in light of the clear numerosity of sites available — and here I disagree to some extent with Ms. Vanderwicken, and I do believe there are clearly sufficient sites available, the court simply — and again, the responsibility is unfortunately in our system, I think, on the court, must look at those factors and come to a view as to what a reasonable number is.

Now, I think in setting that, Judge, there are certain factors that you can take into account, and they are clearly evident on this record. And let's talk for a moment about the financial matters.

If one assumes as I think is a fair assumption that requests for proposals could be issued by the City of Yonkers for any

number of city-owned sites, whether it be the Lincoln school site, the Whitman school site, the School 15 site, the School 4 site, requests for proposals could be issued.

Now, in that process, your Honor, the city could very well, given some goal from this court, indicate to developers that it has city-owned land. The developers are free to make a bid as to how much they will pay for that land. The developers are free to come forward with respect to each of those parcels with a plan which will be [927] inclusionary in terms of some mix economically of housing.

Now, it may very well be that when all is said and done, given the prime nature of School 15 and Walt Whitman, given their location in this county in relatively exclusive kinds of areas, that developers would ask the city for these properties and be willing to pay considerable sums for these properties. Developers might in a sense be running over each other for the opportunity to develop without any subsidy by the City of Yonkers.

The issue of how much tax abatement is necessary and how much of the CDBG money is necessary seems to me quite speculative until one makes that effort with a series of city-owned parcels of which there are many to determine how quote-unquote prime this land is for development in a mixed manner. We have no objection to that kind of process once the 200 units have been constructed.

And it seems to me that the arguments about the city's financial situation in a sense are a lot to do about nothing, because they all presuppose that critical to the construction

of the 80-20 housing is some substantial city subsidy, and it does not seem to me at all evident from this record and from the experience with 80-20 housing on prime sites which are owned by the city already which are vacant which are generating no revenue, that those kinds of arguments are salient.

[928] An 80-20 project, as one of the gentlemen testified to, may very well be tax producing, because the assumption, as Mr. Mallach testified, is that on the 80 percent there is going to be revenue generated, not lost. Beyond that, even if it becomes true that the city must subsidize to some extent to achieve the goal which we have suggested is 450 units, the order of the court it seems to me should be clear as to what the available kinds of subsidies are.

Yes, your Honor?

THE COURT: 450 units is a number that comes from where?

MR. SUSSMAN: 450 units is a number which comes from our perception after you deal with the 200 units of what sites are actually available, the relative developability of those sites —

THE COURT: 450 includes the 200?

MR. SUSSMAN: No, it does not.

THE COURT: That's in addition to the 200?

MR. SUSSMAN: Yes, it is. And it's also our sense, your Honor, that in terms of the density which we would be most interested in, which is a fairly low density on most sites, obviously Whitman you have 20 acres, the number of units that can be built even with fairly low density of 20 or 25 which are lower per acre than the MG [929] classification, you still end up with some 500 units potentially.

But the bottom line is our major objective remedially is to provide sufficient units of low and moderate income housing throughout east Yonkers so as to de-identify, which we believe to be the nature of the violation, most areas of east Yonkers as you can specifically and discreetly define them and not simply put all the housing here or here or here.

And if you start looking at the east side and with that level and number of sites, I think you see that that provides a certain rough equity of distribution given available sites, which happen, I think, as Mr. Pistone's list shows and the school site shows, to be spread out through east and I would add northwest Yonkers, which should not be immune from remedial activity as well.

But I am the first to suggest that the precise number is a question which ultimately comes down to judgment. Even if one has an expert — and as I say, we don't oppose the court having an expert for this reason or for another reason as to the appropriateness of specific sites — it doesn't seem to me from my experience in these cases the expert is going to be able to come up with a mathematically defensible as opposed to some extent an arbitrary number, even with regard to any one site. What [930] number is appropriate on that site is a matter of great debate and is not a matter of particular precision.

So it does — I mean, to me that's somewhat of an exercise in imagination, and the court's imagination, if you will, and discretion is probably as good at this point as an expert's, although, as I said before, if the court feels uneasy about that we have no objection and we will submit names of persons who could give assistance.

But I don't think the enterprise would be that well grounded or would be likely to come to very firm conclusions, and I think it might provide another opportunity for delay, for reargument, for unsettledness, which I am not sure would be necessary.

But the basic point, your Honor, is the order of the court it seems to me in the area of housing production, must pay cognizance of the various tools available to the city. It certainly, at this stage, either in the opinion or the order, should not, that is, this court should not say to the city, you are never going to have to use general obligation bonds, you are never going to have to use your bonding authority otherwise, you are never going to have to use X, Y or Z. It seems to me that would be entirely inappropriate.

At the same time, the court should not sanction, for example, the city's use of ten percent of its CDBG [931] money rather than 50 percent of its CDBG money for this particular purpose. The court's decree has to be flexible in indicating to the city that it should get going as quickly as possible with this kind of RFP approach that we have suggested and see what kind of assistance actually appears to be necessary or even requested by developers.

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It may be, as I indicated, that given the sites we are discussing, the developers will jump at an 80-20 mix once we got beyond the 200 units and will not even need particular assistance. If that's true, fine. There is little issue. If it is not true, then the panoply of possible alternative subsidies is still available, having not been precluded hastily by an order.

It seems to me another matter that if the court adopted this kind of approach would be necessary, quite obviously, is reporting. The city would have to first come in with a group or list of the sites which it proposed to RFP. That list could be added to by the parties. If the city balked at doing that in a short period of time, the court would simply set the list and that at that point the city would have to engineer the request for proposals, publicize them and report back as to what kind of proposals it has received.

And obviously the RFP would have to be clear that the goal it's creating in the simply 80-20 — 80-20 is [932] not magical, but some mix of low and moderate and higher income housing, and, it seems to me a preference should be given to those developers who come in with a mix emphasizing low and find that economically feasible, since that's the group we are most trying to provide for, and if developers can economically do that they should be benefited in the process.

Now, finally, let me speak briefly about the issue of fair housing since that is part of the city's proposal and we have sought to make certain suggestions to the court in that area.

First of all, with regard to the Section 8 existing administration, that administration it seems to us both by

law and by right should be done by an agency of the city. The problem is that to date as I think Mr. Grandin's testimony demonstrated, there has not really been much supervision and aggressiveness at attempting to find housing, particularly in east Yonkers, for low and moderate income people.

Now, part of this is tautological because we argue and assume that there is not that much housing in east Yonkers for these people. So that the issue of what aggressive efforts the city has made, while it is irrelevant indicia of good faith, is at the same time empirically not that interesting because there probably [933] isn't that much housing out there.

Once we agree the city should administer the Section 8 existing program, it seems to me the second issue is how to deal with the fair housing questions, and our proposal there is that the city in fact fund the not-for-profit organization to do things which the city has not in its proposal even suggested, but which from our point of view, and I think the evidence shows, and it was not really questioned by Ms. Hanson's cross-examination, is a critical function, and that's testing.

The reason testing is very important is because when you are trying to place either the Section 8 existing certificate holders or helping people in private market discrimination cases you need a capacity to actually verify that racial discrimination exists, and currently neither the city through its sponsorship nor any other agency in Yonkers does that. And it does seem again clearly at variance with Mr. Sculnick's position, part of the violation in this case that the city, as Ms. Vanderwicken said, not only exacerbated private

market discrimination and reinforced it, but also mirrored it. And it seems to us that dealing with that through aggressive activity, particularly where it relates to publicly assisted housing persons like those receiving these certificates would be a very important and responsive component of a remedy.

[934] Now, the specific budgetary dollars that are necessary, I think, frankly, that should be handled by the hiring of a housing consultant who could give the city and the court advice within a short period of time as to the proper structuring of a not-for-profit, the budget which would be necessary and elaboration to a greater extent on the functions.

I don't think the record in the City of Yonkers through its human rights commission, with all regard to Mr. McDonald who is a very recent occupant of the position, gives us any real basis for the belief that this organ of city government can in fact aggressively handle this. The hamstrung nature of the position in terms of political influences, the budgetary instability and the general vicissitudes of commitment as was shown in the liability case to that agency do not augur well for entrusting it with this important task.

We will be providing as the court indicated written comments, hopefully Friday, if not then on Monday, and we obviously urge the court to act in a strong manner in light of the evidence, and not simply to in a sense delay to another day the process of reckoning which has to come for the city. Thank you.

MR. NELSON: Mr. Nelson? First of all, your Honor, with respect to the Whitman facility, there is no [935] finding in the court's opinion with respect to schools that the Whitman facility in its proposed use as an administrative facility and a teacher training center would detract in any way from the integration effort.

Secondly, there is no evidence on this record to substantiate a finding that the Whitman facility is essential to the remedy of the housing violation. Indeed, there is evidence on this record that there are sufficient sites in east Yonkers to remedy housing violations without the use of the Whitman facility.

Much —

THE COURT: There is also the testimony of Dr. Raymond that the reason for the school's decision to utilize Whitman in the fashion in which the school board proposed was for non-education uses.

MR. NELSON: I think that is a different issue, your Honor, a very different issue. What Dr. Raymond addressed herself to was to achieve the support of the northeast community for the school integration effort. That was the thrust of her testimony, as I remember.

Much of the emphasis and energy that has occurred during these housing hearings has been directed at providing housing opportunities in east and northwest Yonkers. In this landmark and unique case where school and housing issues and indeed the court's findings are so [936] interrelated, there is an additional concern which cannot be ignored.

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If the city's housing practices were responsible in significant part for perpetuating and exacerbating the system-wide racial segregation of the Yonkers public schools, then the scope of the housing remedy must be city wide and must be responsive to alleviating that unlawful condition.

In addressing the school issues, the district and indeed the court in its proposed remedial order has sought to provide integrated equal educational opportunities throughout the school system for all the students in Yonkers. That task, the task of integrating the school system, is facilitated not only by expanding and providing housing opportunities in east and northwest Yonkers, but also, and from our perspective perhaps more importantly, for effective school desegregation to occur and to be responsive to the court's liability findings, the remedial order must also address the racial segregation that presently exists in southwest Yonkers. That's all.

THE COURT: Well, having raised the questions, and I think they are appropriate questions to raise, that is, the relationship between the school and the housing, the question becomes, how does one do that?

Now, one suggestion that I asked for post [937] hearing comments on was the suggestion that the way one furthers both causes, that is, of integrated housing and integrated schools, is a linkage in the rent up priorities, that one says that where a unit becomes available in a predominantly white area, the rent up priority should accord highest preference to a minority family with school children who will attend schools in furtherance of the objectives of the school phase. So that the integrative choice has two inducements, better housing and integrated school setting.

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Now, I was interested in Ms. Hanson's comment that to the extent to which you offer incentives to majority members to occupy housing in predominantly minority areas, again, with a linkage to the schools, you engage in a practice which some people might regard as gentrification, a process which has occurred and is occurring in many parts of many cities.

And — well, my question to you is, obviously one thing which assists the school board in its obligation to further integration in the school system is to improve housing conditions and opportunities throughout Yonkers, but is there anything beyond that that you would propose, and do you have any comment on the suggestion of a — is there any way one can do that other than by rent up priorities, rent up or sale, whichever, whether it is a [938] rental or a sale?

MR. NELSON: I have two comments, your Honor. One with respect to Ms. Hanson's observation on gentrification. As I know gentrification, that is more a condition where you have middle to upper income majority families coming into an urban setting as opposed to eligible, white, low income families with school age children who would be occupying subsidized and low income units in southwest Yonkers.

THE COURT: Generally regarded as the gentries?

MR. NELSON: Exactly. Secondly, I am at somewhat of a disadvantage not having sat through the hearings last week as Mr. Weaver did. He is saddened that he couldn't be here today to make this argument, he would have been here tomorrow, and it is my understanding that in our submission to the court we may have some suggestions and some specifics for you.

THE COURT: All right. Then thank you.

All right. Then this record is closed, and the parties are to make their post remedy hearing submissions by two o'clock on Monday, and I thank you all.

MR. SUSSMAN: Thank you, your Honor.

MS. VANDERWICKEN: Thank you, your Honor.

(Proceedings adjourned)

* * * *

APPENDIX 5 — HOUSING REMEDY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 28, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 CIV 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

– and –

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiffs-Intervenors,

– against –

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

CITY OF YONKERS and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Third-Party Plaintiffs,

– against –

Appendix 5

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, and SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Third-Party Defendants.

HOUSING REMEDY ORDER

May 28, 1986

HONORABLE LEONARD B. SAND, U.S.D.J.

* * *

SAND, J.

Pursuant to this Court's liability findings of November 20, 1985, the evidence adduced at the remedial hearing, the supplemental findings set forth in the Opinion filed this date and the subsequent written submissions and oral arguments of the parties, the Court enters the following Order.

I. *Injunction*

The City of Yonkers, its officers, agents, employees, successors and all persons in active concert or participation with any of them, are permanently enjoined from:

A. blocking or limiting the availability of public or subsidized housing in east or northwest Yonkers on the basis of race or national origin;

B. confining public or subsidized housing to southwest Yonkers on the basis of race or national origin;

C. otherwise intentionally promoting racial residential segregation in Yonkers;

D. interfering with any person who is exercising or attempting to exercise his or her rights to equal housing opportunities;

E. taking any action intended to deny or make unavailable housing to any person on account of race or national origin, or

F. impeding or interfering with the successful implementation of the school desegregation remedy.

II. *Fair Housing Resolution and Office*

It is further ordered that the City shall take the actions described below to implement a fair housing program.

A. Within 30 days of the date of this Order, the City shall adopt a Resolution of the City Council setting forth the fair housing policy of the City of Yonkers: to assure equal housing opportunities and nondiscrimination in the provision of housing throughout the entire City.

B. Within 60 days of the date of this Order, the City shall adopt a Resolution of the City Council establishing a Fair Housing Office (FHO). The FHO shall have the general responsibility to administer and implement the fair housing

policy of the City and shall have the specific responsibilities described below. The City shall provide for adequate funding of the FHO throughout the life of this Order to ensure that it may fully carry out its responsibilities. The FHO shall establish a principal office and auxiliary offices as needed. The FHO shall publicize and promote the services it offers.

C. The FHO shall be headed by an Executive Director. The City shall provide funds for sufficient staff to carry out all of the FHO's responsibilities under this Order. Staff shall be hired by the Executive Director.

D. Within 30 days after passage of the FHO Resolution, the City shall submit to the United States and plaintiffs-intervenors the names and qualifications of not less than three candidates for Executive Director. Within 15 days thereafter, the United States and plaintiffs-intervenors shall respond to the City, indicating which, if any, of the candidates are acceptable. The City Manager shall, within 15 days of these responses, appoint a candidate from among those approved by both the United States and plaintiffs-intervenors. If the United States and plaintiffs-intervenors do not agree on the acceptability of any of the City's candidates, they shall include in their responses to the City the names of two or more candidates of whom they approve. If the City Manager finds none of these alternative candidates acceptable, this Court shall make the selection from among all those suggested by the parties. If the position of Executive Director becomes vacant during the life of the decree, the same procedure shall be followed in making subsequent appointments with time periods adjusted so that the position does not stay vacant for longer than 60 days.

E. In order for the other parties effectively to monitor the City's compliance with its obligations under this Order, the FHO shall submit to the City Manager and the United States and plaintiffs-intervenors each year during the life of this Order a proposed plan of activities and programs for the following year. The first such plan shall be submitted within 60 days of the appointment of an Executive Director. The United States and plaintiffs-intervenors shall have 30 days to make suggestions and comment on the plan before it is adopted by the City Manager. The City Manager must adopt a plan within 60 days of its submission.

The FHO shall also, on a semi-annual basis, report to the United States and the plaintiffs-intervenors on its activities for the period, including any difficulties encountered in carrying out its responsibilities under this Order. The FHO shall maintain detailed records of its activities and, upon reasonable notice, shall make these records available to the United States or plaintiffs-intervenors for review.

F. The FHO shall have the functions and responsibilities as set forth below:

1. On an ongoing basis, the FHO shall review the activities of City agencies and offices for compliance with the fair housing policy of the City and the terms of this Order. The FHO shall, as it deems appropriate, make recommendations to such entities for actions to be taken to ensure compliance with the fair housing policy and this Order. In its reports to the United States and plaintiffs-intervenors, the FHO shall include full

information about its reviews of City agencies' activities, any recommendations made by the FHO and any agency action taken in response to such recommendations.

2. The FHO shall conduct educational programs for City and School District personnel, as well as for the community at large, to explain the City's fair housing policy and its enforcement efforts and obligations under this Order. Such programs should be designed to elicit support for the remedial efforts of the City and the Board of Education and to promote racial harmony in Yonkers. The FHO shall coordinate with the School Board the development and presentation of programs explaining fair housing policy to City school children. These educational programs shall be initiated as soon as possible (and, in no event, more than 60 days) after the appointment of an Executive Director. To the extent appropriate and feasible, the FHO shall make use of the services and experience of private and public organizations which have developed programs to aid communities experiencing desegregation.

3. The FHO shall collect information relating to housing needs and services, identify available rental and sales units within the City and provide information to homeseekers seeking housing on a nondiscriminatory basis and inform them of the availability of rental management companies, brokers, local lending institutions and agents. To

assist the FHO in the gathering of this and any other relative information, the FHO shall have the right and authority to issue subpoenas which shall be enforceable by this Court. The FHO shall perform all of its functions on a continuing and nondiscriminatory basis throughout the life of this Order. The FHO shall ensure that all persons who request its assistance in obtaining housing are made aware of housing opportunities in all areas of the City. The FHO shall in particular make such information available to all persons in the City receiving Section 8 certificates who seek its services and the Municipal Housing Authority (MHA) shall inform persons obtaining certificates from that agency of the services available through the FHO.

4. The FHO shall offer training concerning fair housing practices for persons in the housing rental and sales business. In addition, the FHO shall require and conduct training concerning fair housing practices for all persons responsible for the management or marketing of housing currently receiving City assistance or housing developed pursuant to the Order.

5. The FHO shall ensure that all housing made available pursuant to the operation of this Order, and all housing otherwise receiving City, state or federal assistance, including housing in the southwest quadrant, be affirmatively marketed either through the FHO's own efforts

or by review, approval and monitoring of the affirmative marketing plans of persons providing such housing. These efforts shall be designed to ensure that such housing is made available to all persons regardless of race or national origin and to ensure that persons who, based on past experience, have been least likely to occupy housing in a particular area of the City are fully informed of all housing opportunities there. The affirmative marketing plans shall be consistent with the occupancy priorities provisions (¶ VII) of this Order.

6. The FHO shall coordinate with appropriate personnel from the Yonkers Board of Education to ensure that demographic data, school enrollment data, plans for housing and school program development and other information relevant to the remedial process is available to both the Board and the City.

7. In providing information about available housing resources to persons seeking such information, the FHO also shall inform such persons of their rights to equal housing opportunities under the City's fair housing policy, state law and the Federal Fair Housing Act of 1968. The FHO shall alert persons seeking housing that a refusal to rent or sell on account of race or national origin or the imposition of different terms and conditions of rental or sale on account of race or national origin, is against the

law, and shall encourage such persons to immediately report any suspected discrimination to the FHO. The FHO shall refer persons who wish to file complaints concerning suspected discrimination to, as appropriate, the Yonkers Commission on Human Rights, HUD, the New York Division of Human Rights, and the United States Department of Justice, and shall inform them of other assistance available through private non-profit agencies. The FHO shall assist complainants in communicating with the appropriate agencies and shall cooperate with such private and governmental agencies in their activities. The FHO shall not conduct or intervene in litigation proceedings except proceedings to enforce subpoenas issued pursuant to paragraph 3 hereof.

III. *Transfer of Section 8 Administration*

It is further ordered that the City shall, within 60 days of the date of this Order, seek HUD approval to transfer administration of its Section 8 existing program to the Yonkers Municipal Housing Authority (MHA). The FHO shall cooperate with the MHA in assisting certificate holders to obtain housing in all areas of the City on a nondiscriminatory basis and shall report on its own and the MHA's actions in this regard. HUD shall advise the Court and the parties within 30 days after such application whether it has approved the transfer, and if not, its reasons for such disapproval.

Appendix 5

IV. *Public Housing Units*

The City has previously committed itself to provide acceptable sites for 200 units of public housing as a condition for receiving its 1983 Community Development Block Grant ("CDBG") funds but has failed to do so. Pursuant to the 1984 HUD-NAACP Consent Order entered by this Court, HUD agreed to fund 200 units of public housing east of the Saw Mill River Parkway. The Consent Order provided that HUD would initiate procedures to reduce funding of the City's 1984-85 CDBG entitlement grant up to its full amount unless the City submitted to HUD for preapproval sites for at least 140 of the 200 units. But for the terms of this Order, HUD's authority to commit the 1984-85 CDBG funds would expire on September 30, 1986 (funds for the grant were appropriated in 1983 and "remain available until September 30, 1986." P.L. 98-45, 97 Stat. 223, July 12, 1983). HUD shall obligate the funds prior to the expiration of the funding authority in September if either (a) the City submits an acceptable Housing Assistance Plan (HAP) and other documentation as required by 24 C.F.R. § 570.302 prior to that expiration, or (b) such HAP and documentation are deemed submitted as herein provided. If the City submits all requisite documents, HUD shall obligate the funds, but make their availability conditional on the City submitting acceptable sites in East Yonkers for development of 140 units of public housing. (The Court finds such action would be consistent with HUD's obligations under paragraph 6.B. of the March 19, 1984 Consent Decree with the NAACP). The City would accept this condition by execution of a grant agreement containing the condition. Because, but for the terms of this Order HUD could not obligate the funds until the City

submits all necessary documents, the City is hereby ordered to submit the required documents and execute the conditional grant agreement prior to the expiration of the funding authority, and to make timely submission of acceptable sites.

A. Accordingly, it is ordered that the City shall, within fifteen (15) days of the date of this Order, submit to HUD an acceptable HAP for the 1984-85 program year and other documentation required by 24 C.F.R. § 570.302. HUD shall advise within ten (10) days thereafter if the HAP and other documentation is acceptable. If the City fails to submit an acceptable HAP and other documentation as heretofore provided, plaintiff and plaintiffs-intervenors shall submit same to the Court and to HUD within the next five (5) days, and upon approval by this Court, said submission shall be deemed to be the HAP for the City of Yonkers for the 1984-85 program year and to have satisfied any and all HUD regulations and relevant statutes requiring such HAP.

B. It is further ordered that the City shall, within fifteen (15) days of the date of this Order, execute a grant agreement with HUD for the 1984-85 program year, with the condition that receipt of the grant depends on submission of acceptable sites for 140 units of family public housing. If the City fails to execute such grant agreement within fifteen (15) days from the date of this Order, plaintiff and plaintiffs-intervenors shall submit such an agreement to the Court and to HUD within the next ten (10) days, which grant agreement, upon approval by the Court, will be deemed to have been executed by Yonkers and to have satisfied any and all relevant statutes and HUD regulations requiring such agreement.

C. It is further ordered that the City shall within thirty (30) days of the date of this Order, submit to HUD for preapproval at least two sites for 140 units of family public housing, along with the necessary supporting documentation. HUD shall advise within fifteen (15) days thereafter whether the sites so submitted are approved. If the City fails to designate approved sites within the time periods set forth herein, and only if the City fails to make such designation, then the City will be deemed to have submitted as said sites such combination of the following sites *and* any other available sites as plaintiff and plaintiffs-intervenors shall designate and the Court shall approve:

(a) School 4. This site may be used for rehabilitation of the existing school building and new construction on that site, or new construction on the black top area, or some combination thereof;

(b) School 15 and the Walt Whitman School. If this provision becomes operative by virtue of the failure of the City to designate alternative sites, the School Board is hereby ordered to return the Whitman site to the City. The School Board may, if it wishes, reserve to itself rights to occupy such space on the Whitman site as shall be reasonably necessary and appropriate for teacher training and library storage facilities (the only uses for Whitman presently envisioned by the School Board).

Nonassisted units may also be placed on the aforesaid sites together with assisted units (*e.g.*, in an 80/20 ratio) provided that the total number of assisted units resulting from all site designations is 140 units.

D. It is further ordered that, within ninety (90) days of the date of this Order, the City shall submit sites to HUD, with all the necessary supporting documentation for the remaining 60 units of public housing committed by HUD pursuant to the 1984 Consent Order, which sites shall (unless otherwise authorized by the Court) be selected from a list contained in Exh-NAACP RH-16 (6 available privately-owned sites listed by the Yonkers Planning Director as suitable for development of public housing). Provided, however, that no privately owned sites from this list shall be submitted unless such submission is accompanied by either (a) an agreement of sale or assignable option between the MHA and the owner of the property or (b) a written agreement between the MHA and the owner under which the owner (or developer with an option that provides control) of the site agrees, if selected pursuant to the MHA's request for Turnkey proposals, to develop on a Turnkey basis a specified number of public housing units. The public housing units may themselves constitute the total development of the site or be a part of a larger (public/private) development on the site. The owner (or developer with an option that provides control) of the site must also agree to make the site available to the developer whose Turnkey proposal is selected should the proposal by the owner (or developer with an option that provides control) not be selected as a result of the MHA's request for Turnkey proposals.

E. It is further ordered that within ninety (90) days of site preapproval for the 140 units, the City shall cause the MHA to submit site development proposals, pursuant to 24 C.F.R. § 941.404, for the preapproved sites. If the City shall fail to submit site development proposals within the

said time period, the plaintiff and plaintiffs-intervenors shall submit same to the Court and to HUD, which, upon approval by the Court, shall satisfy any and all statutory or regulatory requirements in the manner heretofore provided.

F. If Yonkers shall not comply with the directions contained in this Order so that the obligations which are its primary responsibility to designate sites and provide the necessary documentation for the development of the housing units referred to herein devolve on the plaintiffs and plaintiffs-intervenors, the Court may appoint a person expert in such matters to assist the Court and the parties in the preparation of the materials required pursuant to this Order, whose reasonable compensation shall be paid by Yonkers.

V. *Affordable Housing Trust Fund*

The City shall create an Affordable Housing Trust Fund to be administered by the Fair Housing Office in cooperation with HUD and the MHA. The City will initially fund the trust with not less than 25 percent of the CDBG funds presently allocated by HUD to the City which minimum funding level may be diminished by 5 percent in each of the three succeeding years. In addition, the City will use its best efforts to secure additional funding for the trust fund from other governmental and private sources.

1. These funds will be used to foster the private development of low and moderate income housing by developers who will include 10 percent to 20 percent low and moderate income housing in their proposed development by providing the following incentives:

(i) write down of the site price of City-owned land;

(ii) finance surveys, market analyses and other similar pre-construction costs;

(iii) finance site infrastructure improvements such as sewers;

(iv) interim construction loan financing at below market interest rates;

(v) rental and/or mortgage subsidies to low and moderate income households in such developments; and

(vi) funds to low and moderate income families for rehabilitation.

2. Housing developments will be chosen by the Fair Housing Office to receive trust fund aid in order to advance racial and economic integration.

VI. *Plan for Development of Additional Subsidized Housing*

The City shall develop a Plan for the creation of additional subsidized family housing units (beyond the 200 units provided for in IV, *supra*) in existing residential areas in east or northwest Yonkers. In such Plan, the City shall be free to provide for the utilization of such private and public

funding resources as are available to it including the Affordable Housing Trust Fund. The Plan may provide for units of subsidized housing to be part of a larger development including market rate housing in such ratio (*e.g.*, 80 percent market rate; 20 percent subsidized) as shall be appropriate for the site and proposed development. The City may also provide such units by requiring private developers to construct units of subsidized housing as a condition to obtaining variances or zoning changes, which subsidized units may be on the site in question or on another acceptable site or sites. The City may also provide in its Plan for the purchase and/or lease by MHA of available units in existing private condominiums, co-operatives or rental buildings throughout Yonkers. However, before such units may be included in the Plan, the City must have obtained realistic assurances that the units will in fact be available for this purpose (*e.g.*, the willingness of the seller; approval of cooperative board, if required; acceptable price, etc.). The City shall furnish to the Court and the parties a detailed statement of this Plan by November 15, 1986, which Plan shall contain the following:

(a) number of subsidized units proposed for construction or acquisition;

(b) location of such sites;

(c) rent levels or degree of subsidization;

(d) marketing or rent-up plans;

(e) such other information as shall be necessary or appropriate to enable evaluation of the feasibility of the Plan

and the extent to which the construction or acquisition of the units in question will further the integrative goals of this Order.

The parties shall have thirty (30) days thereafter to comment on said Plan, after which time the Court may schedule a hearing to determine its adequacy in light of the violations and needs found to exist. In the event that the Plan shall be found to be inadequate, the Court reserves all of its rights and powers to make such modifications in the Plan or require such additional action by the City as the circumstances shall warrant.

VII. *Occupancy Priorities*

A. Public Housing

The first priority for occupancy of public housing units made available in east Yonkers shall be given to eligible persons on the existing waiting list for such housing. The second priority for these units shall be given to families now living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of this Court's School Desegregation Order of May 14, 1986.

B. All Other Units

The first priority for occupancy of all other units made available pursuant to this Order in east Yonkers shall be given to families now living in southwest Yonkers who have school

age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

C. It is anticipated that the City will continue and accelerate its efforts to rehabilitate substandard housing throughout the City, although rehabilitation efforts in southwest Yonkers will not relieve the City from its other obligations hereunder. The first priority for occupancy of rehabilitated units in southwest Yonkers shall be given to eligible families living in east Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

The first priority for occupancy of rehabilitated units in east Yonkers shall be given to eligible families living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

VIII. *City to Seek Available Financing*

The City shall submit timely and complete applications for CDBG entitlement funds for each program year during the pendency of this Order, including appropriately prepared Housing Assistance Plans, and assurances of compliance with all conditions placed on receipt of such funds. The City shall seek all other available forms of financial assistance from both public and private sources which are currently available or which become available during the pendency of this Order.

Appendix 5

IX. *Notice*

The City shall not grant any zoning change or variance or issue a building permit to any private developer with respect to any of the sites referred to in this Order or listed on Exh-NAACP R.H. 16 without furnishing twenty (20) days prior written notice to the United States, the plaintiffs-intervenors and the Court.

X. *Funding*

The City shall provide funding for all of the measures set forth herein. The City shall also provide funding for all of the school desegregation measures required by this Court's Order of May 14, 1986.

The City and its agencies responsible for implementing the remedial Order shall maintain records of all actions taken pursuant to the Order. All such records shall be made available for review by the United States and plaintiffs-intervenors upon reasonable notice.

XI. Jurisdiction

This Court shall retain jurisdiction of this matter for five years. At the end of that period, the City may move for the dismissal of this case. Dismissal shall be granted unless, within thirty days from receipt of that motion, the United States ~~or plaintiffs~~-intervenors object to the dismissal. If such an objection is made with sufficient particularity, the Court shall hold a hearing on the dismissal motion, and the

objecting party shall have the burden to demonstrate why the motion should not be granted. If the objecting party fails to carry its burden, the case shall be dismissed with prejudice.

SO ORDERED.

Dated: New York, New York
May 28, 1986

s/ Leonard B. Sand
U.S.D.J.

APPENDIX 6 — MODIFICATION TO HOUSING REMEDY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND FILED JULY 8, 1986

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

80 CIV 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH-N.A.A.C.P, *et al.*,

Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION, *et al.*,

Defendants.

Modification to Housing Remedy Order
dated May 28, 1986

Pursuant to my order of June 26, 1986, denying the Motion by the United States Department of Housing and Urban Development for Amendment of the Housing Remedy Order as to Paragraph 1 and granting the Motion as to Paragraphs 2, 3, and 4, the Housing Remedy Order of May 28, 1986 is hereby modified as follows:

Appendix 6

1. Paragraph V. shall be amended to read:

The City shall create an Affordable Housing Trust Fund to be administered by the Fair Housing Office in cooperation with HUD and the MHA. The City will initially fund the trust with not less than 25 percent of the CDBG funds allocated to the City in program years 1984-85, 1985-86, and 1986-87, which minimum funding level may be diminished by 5 percent per year in each of the succeeding years of this decree. . . .

1. These funds will be used to foster the private development of low and moderate income housing by developers who will include at least 20 percent low and moderate income housing in their proposed developments, provided that the portion of the total development cost of each building that is borne by CDBG funds be no greater than the percentage of units in the project that will be occupied by low and moderate income persons, by providing the following incentives. . . .

2. Paragraph IV.B. shall be amended to read:

It is further ordered that within fifteen (15) days of the date that HUD approves the City's HAP, the City shall execute a grant agreement with HUD for the 1984-85 program year, with the condition that receipt of the grant depends on submission of acceptable sites for 140 units of family public housing. If the City fails to execute such grant agreement within fifteen (15) days of

> the approval of the HAP, plaintiff and plaintiffs-intervenors shall submit such an agreement to the Court and to HUD within the next ten (10) days, which grant agreement, upon approval of the Court, will be deemed to have been executed by Yonkers and to have satisfied any and all relevant statutes and HUD regulations requiring such agreement.

Based on notification of an inconsistency by counsel for Yonkers, Paragraph IV.A. of the Housing Remedy Order is also modified as follows:

> Accordingly, it is ordered that the City shall, within fifteen (15) days of the date of this order, submit to HUD an acceptable HAP for the 1986-88 program years and other documentation required by 24 C.F.R. § 570.302. HUD shall advise within ten (10) days thereafter if the HAP and other documentation is acceptable. If the City fails to submit an acceptable HAP and other documentation as heretofore provided, plaintiff and plaintiffs-intervenors shall submit same to the Court and to HUD within the next five (5) days, and upon approval by this Court, said submission shall be deemed to be the HAP for the City of Yonkers for the 1986-88 program years and to have satisfied any and all HUD regulations and relevant statutes requiring such HAP.

SO ORDERED.

Dated: New York, New York
July 8, 1986

s/ Leonard B. Sand
U.S.D.J.

APPENDIX 7 — FIRST REMEDIAL CONSENT DECREE IN EQUITY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND FILED JANUARY 28, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 CIV 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

– and –

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *ET AL.*,

Plaintiff-Intervenor,

– against –

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

FIRST REMEDIAL CONSENT DECREE IN EQUITY

The following sets forth certain agreements of the parties to this litigation, and certain actions which the City of Yonkers (the "City") will take in connection with a

consensual implementation of Parts IV and VI of this Court's Housing Remedy Order (the "HRO") entered on May 26, 1986. Accordingly, the parties agree as follows:

Public Housing

SECTION 1. The City acknowledges its continuing commitment to the construction of the 200 units of public housing made available by the United States Department of Housing and Urban Development ("HUD") pursuant to the consent decree of March 19, 1984 between HUD and plaintiff-intervenor.

SECTION 2. The City agrees to provide the sites referred to below in this Section under the caption "Sites" for the location of a total of 200 units of public housing referred to in Section 1. The number of such units to be located on each site is not to exceed the number set forth under the caption "Maximum Density" opposite each site.

Sites	Maximum Density
Whitman School (north-west field)	40
Lincoln School (lower field)	48*
School 4	24

* If HUD does not approve this proposed density for the Lincoln School site, the densities at other approved sites will be appropriately adjusted.

Appendix 7

Helena Avenue	22
Wrexham Road	30
Clark Street	20
Valentine Street	16

SECTION 3. (a) The City shall have the right to submit no later than ten days after the date of this decree a maximum of two additional sites acceptable to HUD to be used for the location of a portion of the 200 units of Public Housing referred to in Section 1.

(b) If the City avails itself of the right to submit additional sites as set forth in paragraph (a), the City shall also submit to the Court a proposed amendment to Section 2 hereof, setting forth an expanded list of sites and their respective "Maximum Densities", provided that the Maximum Density of no site shall be fewer than 12 units.

(c) Upon approval by the Court, the proposed amendment to Section 2 shall have the same effect as if fully set forth herein at this time.

(d) The City acknowledges and understands that, if no additional sites are proposed by it and approved by the Court, the 200 units of public housing shall be located on the sites and in the densities currently set forth in Section 2.

Appendix 7

SECTION 4. On or before the later of fifteen days from (i) the date of this decree or (ii) the date of any approval by the Court of an amended Section 2 (as contemplated by Section 3(c) hereof), the City shall make (or shall cause to be made) fair market value offers to purchase from their respective owners such private sites as are set forth in Section 2 (as theretofore amended). Such offers shall also advise the respective owners that, in the absence of a voluntary agreement for the purchase by (or on behalf of) the City, the City will commence (or will cause to be commenced) legal proceedings to secure control over the relevant site in the most expeditious manner, including the use of the power of eminent domain.

SECTION 5. On or before 60 days of the date of this decree, the City will have (i) concluded negotiations with, and will have acquired title from, owners of private sites willing to sell their respective properties to the City on mutually agreed upon terms or (ii) commenced eminent domain proceedings against owners of private sites who have been theretofore unwilling voluntarily to sell their respective properties.

SECTION 6. On or before 80 days from the date of this decree, the City shall have caused the Municipal Housing Authority ("MHA") to prepare a request for proposals ("RFP") from developers for the construction of 200 units of Public Housing to be located as provided in Section 2. The parties agree that they will cooperate in good faith with each other, the MRA and HUD to insure that the preliminary steps in the preparation of a final RFP (including (i) the preparation of preliminary site reports for all sites (which

shall be prepared at the City's expense subject to reimbursement from HUD, if HUD approves the development proposal), (ii) the subsequent review of such site reports by HUD, (iii) any conferences required to agree on appropriate language for the RFP, and (iv) the drafting of the final RFP) can be completed within the time limitation set forth in this Section.

SECTION 7. (a) On or before the later of (i) 10 days after having acquired site control over all the sites referred to in Section 2 or (ii) the time limitation set forth in Section 6, the City shall cause the MHA to publish at the City's expense the RFP referred to in Section 6 in a manner reasonably calculated to insure that the RFP is broadly disseminated to developers doing business in the Yonkers area. The methods of publication shall include (without limitation) advertisements in *The New York Times* and another newspaper of general circulation in the Yonkers area, direct mailings to specific developers, and periodic advertisements in no fewer than two trade magazines identified by the OHA, and shall otherwise conform to HUD Handbook 7417.1 REV-1 (October 1980) ¶ 6-39(b).

(b) The publication referred to in paragraph (a) shall be made at least once each week for two consecutive weeks.

SECTION 8. The review of developers' proposals shall begin 55 days after the date on which the RFP is first published. The MHA shall complete such review within 20 days and submit its selection to HUD immediately

thereafter for HUD's review according to HUD's procedures. Construction shall begin as promptly as practicable following HUD's approval of the development proposal.*

SECTION 9. The City will fully and in good faith cooperate with all persons, parties, and organizations the involvement of which is necessary or desirable for the completion of the process contemplated hereinabove.

SECTION 10. The City agrees that, to the extent it relates to the City's obligation to provide sites for the placement of 200 units of public housing, it will seek no further appellate review of the decision of this Court entitled *United States of America et al. v. Yonkers Board of Education et al.*, 624 F.Supp. 1276 (S.D.N.Y. 1985) or of any subsequently entered decree. The City acknowledges that if any subsequent appellate ruling (whether such ruling had been prosecuted by the City or any other party to this litigation) were to nullify or in any way weaken the constitutional or statutory basis of the City's obligation to provide such sites (as found by the Court in the opinion above), the City would, nevertheless, be required by this Decree on Consent fully to discharge such obligations as set forth herein.

SECTION 11. The parties acknowledge that HUD has not heretofore given its final approval for the sites and densities set forth in Section 2 or for any final development

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* The parties acknowledge that HUD's processing time for such approval is 50 days. The parties understand that HUD will expedite the approval process if possible.

plans for such sites and that, in accordance with the Consent Decree dated March 19, 1984, HUD may disapprove specific proposals that fail to meet applicable standards for approval.

Assisted Housing

SECTION 12. The City acknowledges that a long-term goal (the "Goal") of 800 units of assisted housing (the "Units" is an appropriate target in fulfilling its obligations pursuant to Part VI of the HRO. The City will, subject to the terms hereof, make good faith efforts to take such steps as are required to achieve said Goal on or before June 30, 1992 and to achieve benchmarks of 200, 400, and 600 Units on or before the first, second, and third anniversaries, respectively, of the adoption of Mandated Incentives (as contemplated in Section 17).

SECTION 13. (a) There shall be a presumption in favor of allowing two years for the Mandated Incentives to demonstrate their effectiveness in fostering the development of a sufficient number of Units timely to achieve the Goal without the adoption of additional remedial measures.

(b) Notwithstanding paragraph (a), after the first anniversary of the adoption of Mandated Incentives, plaintiff or plaintiff-intervenor may move the Court for an order directing the City to take additional remedial measures if the movant satisfies the burden of overcoming the presumption referred to in paragraph (a) by clear and convincing evidence that the Mandated Incentives are insufficient timely to achieve the Goal.

(c) If, on or after the second anniversary of the adoption of Mandated Incentives (or at such earlier date as provided in paragraph (b)), the 400-Unit benchmark referred to in Section 12 has not been met, the plaintiff or the plaintiff-intervenor may apply to this Court for an order requiring the City to adopt additional or substituted remedial measures to insure that the Goal will be timely met.

(d) The City acknowledges that the additional or substituted remedial measures which the Court may require it to adopt as provided herein may include the requirement that the City issue (or cause to be issued) RFPs for the construction of multi-family housing (to include Units) on city-owned land. The City acknowledges further that it would be within the power and jurisdiction of the Court to require such use of city-owned land.

SECTION 14. The parties agree that the Units shall be provided only in conjunction with, or as a part of, housing developments containing units to be offered for sale or rental at market rates.

SECTION 15. The parties agree that, pursuant to Section 12, no fewer than (a) 100 Units shall be provided on terms affordable to families earning no more than 50 percent of the median income in the New York Metropolitan Area; (b) 300 Units shall be provided on terms affordable to families earning no more than 80 percent of the median income in such Area; (c) 300 Units shall be provided on terms affordable to families earning no more than 100 percent

of the median income in such Area; and (d) 100 Units shall be provided on terms affordable to families earning no more than 120 percent of the median income in such Area.

SECTION 16. This decree shall impose on the City no obligation with respect to city-owned property, except as contemplated by Sections 2 and 13 and previously issued orders of this Court.

SECTION 17. The City agrees to adopt, among other things, legislation (a) conditioning the construction of all multi-family housing (inclusive of projects for future construction currently in the planning stage but which will require zoning changes, variances, special exceptions, or other discretionary approvals from the City to begin construction) on the inclusion of at least 20 percent assisted units; (b) granting necessary tax abatements to housing developments constructed under the terms of the legislation referred to in clause (a); (c) granting density bonuses to such developers; (d) providing for zoning changes to allow the placement of such developments, provided, however, that such changes are not substantially inconsistent with the character of the area; and (e) other provisions upon which the parties may subsequently agree (including the use of the Industrial Development Authority as a development vehicle and the creation of a municipally-designated, independent not-for-profit Local Development Corporation) (collectively, the "Mandated Incentives"). The City agrees to implement a package of Mandated Incentives as promptly as practicable but, in no event, later than 90 days after the entry of this decree.

Appendix 7

SECTION 18. (a) The parties acknowledge that certain issues remain to be agreed upon. These issues include, without limitation, the appropriate percentage configuration (as between assisted- and market-rate units) of the relevant housing developments; the appropriate share of Units devoted to rental or to ownership; the appropriate resale limitations for Units allocated to ownership; the implementation of other financial mechanisms to facilitate the provision of Units or to make them more widely affordable; the appropriate disposition of such funds as are deposited in the AHTF; the steps which the City may take to make the use of "section 8 certificates" more widely available; and the possibility of a reduction in the Units to be made available at prices affordable by the income groups referred to in clauses (b) and (c) of Section 15 if the City were to secure the placement of units of assisted housing in certain housing developments currently under consideration in the City.

(b) The parties agree that they will work diligently to agree on such subsidiary issues and submit to the Court on or before February 15, 1988 a Second Remedial Consent Decree setting forth any understandings with respect to such matters.

SECTION 19. If in the view of any party there exists a problem or obstacle to the full or timely implementation of this decree, any party may bring such issue before this Court for resolution.

SECTION 20. Plaintiff-intervenor or the City may assert before this Court such rights it may have to challenge the

discretionary decisions which HUD may make in making available the 200 units of public housing which are the subject of this decree, including any decision not to waive the Total Development Cost cap.

Dated: January 25, 1988

Plaintiff,
The United States of America

By: s/ Brian Heffernan
Brian Heffernan, Esq.

Civil Rights Division
U.S. Department of Justice
10th & Pennsylvania Aves., N.W.
Washington, D.C. 20535

Attorneys for Plaintiff

Plaintiff-Intervenor,
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By: s/ Michael H. Sussman
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Attorneys for Plaintiff-Intervenor

Appendix 7

Defendants,
The City of Yonkers and Yonkers
Community Development Agency

By: s/ Michael Sculnick
Michael Sculnick, Esq.

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New York, New York 10022

Attorneys for Defendants
The City of Yonkers and
Yonkers Community Development
Agency

SO ORDERED:

s/ Leonard B. Sand
Leonard B. Sand, U.S.D.J.

Dated: January 28, 1988

APPENDIX 8 — ORDER AMENDING HOUSE REMEDY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 13, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 CIV 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

– and –

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiffs-Intervenors,

– against –

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

CITY OF YONKERS and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Third-Party Plaintiffs,

– against –

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UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, and SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Third-Party Defendants.

ORDER AMENDING
HOUSING REMEDY ORDER

SAND, J.

On consent of all of the parties, the Housing Remedy Order, dated May 28, 1986, is hereby amended as follows:

VII. Occupancy Priorities

A. Public Housing

The second sentence beginning with the words "The second priority" is deleted in its entirety.

B. All Other Units

This section is deleted.

C. The second sentence of the first paragraph is deleted. The second paragraph is deleted.

SO ORDERED.

Dated: New York, New York
April 13, 1988

s/ Leonard B. Sand
U.S.D.J.

APPENDIX 9 — LONG TERM PLAN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND FILED JUNE 13, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

80 CIV 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

YONKERS BRANCH — NAACP, *et al.*,

Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION, *et al.*,

Defendants.

LONG TERM PLAN ORDER

Section 17 of the First Remedial Consent Decree in Equity (the "First Decree") requires the City of Yonkers to take certain actions with respect to the long term housing plan (the "Long Term Plan") required by Section VI of this Court's May 26, 1986 Housing Remedy Order. Section 18 of the First Decree further contemplates that the parties may reach an understanding with respect to certain issues relating

to the implementation of the long-term Goal[1] and shall set forth such understanding in a Second Remedial Consent Decree to be presented to the Court.

The City has failed to take those actions which are the subject of Section 17 of the First Decree. The City has further informed the Court and the parties that it will not negotiate toward reaching an understanding on certain other Long Term Plan issues, as required by Section 18 of the First Decree. In light of these actions of the City of Yonkers, plaintiff and plaintiff-intervenors have jointly submitted a Long Term Plan proposal for the court's consideration, accompanied by their joint amended Long Term Plan comments and a joint motion for this court to enter their proposal. Having reviewed these submissions, and the response of the city thereto, the Court hereby enters the following Order with respect to the Long Term Plan:

It is hereby ORDERED, ADJUDGED and DECREED:

SECTION 1. *Number and Distribution of Assisted Units.*

(a) Consistent with Section 17(a) of the First Decree, the City shall condition the construction of any multifamily housing development (as defined in Section 17(a) of the First Decree and Section 2 below) on the

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1. All capitalized terms not herein defined are used as defined in the First Decree. Housing- and zoning-related capitalized terms (not defined herein or in the First Decree) used in Sections 2 and 8 hereof are used as defined in Chapter XVII of the Code of the City of Yonkers.

inclusion of a number of assisted units in such development equal to 20 percent of the maximum aggregate number of units authorized for construction in such development in instances where the existing zoning already permits a density of sixty (60) units per acre or more, the number of assisted units can be limited to 10 percent or more of the total number of units in the development, if the maximum density bonus that will then be given to the developer is not in excess of 50 percent over the permitted zoning. If the bonus sought is in excess of 50 percent over the permitted zoning, the 20 percent ratio shall apply.

(b) The total number of assisted housing units (calculated as provided in paragraph (a)) in each such multifamily housing development shall be allocated to the income groups specified in Section 15 of the First Decree so that the number of assisted units respectively allocated (i) to households described is clause (b) of such Section does not exceed three times the number of assisted units allocated to households described in clause (a) of such Section; (ii) to households described in clause (c) of such section does not exceed the number of assisted units allocated to households described in clause (b) of such section; and (iii) to households described in clause (d) of such Section does not exceed one-third (rounded to the nearest whole number) of the number of assisted units allocated to households described in clause (c) of such Section. Notwithstanding the previous sentence, if the aggregate minimum number, of assisted units to be allocated to any of the four income groups specified in Section 15 of the First Decree is attained before the

minimum is reached for remaining groups, assisted units constructed thereafter shall be allocated (in the same proportion) only to income groups whose minimum has not theretofore been attained.

(c) The number of two-bedroom assisted housing units to be provided in each such housing development shall equal at least 60 percent of the total number of assisted housing units. At least 30 percent of the assisted units in each such housing development shall be three-bedroom units (or larger). Up to 10 percent of assisted units way be one-bedroom.

SECTION 2. *Target Areas.*

(a) The assisted housing requirement described in Section 1 above shall apply, until the Goal is reached, to multifamily housing (including apartment buildings, rowhouses or townhouses; located in zoning districts of East and Northwest Yonkers currently zoned MG, M, A, B and BA. In reviewing and approving development proposals, the Office of Implementation (see below) and the City shall seek, to the extent possible consistent with the timetable and goals of this Order, to assure the provision of assisted housing in a dispersed manner and so to avoid the undue concentration of both public and assisted units in any neighborhood of Yonkers. Priority shall be given to Long Term Plan proposals which avoid such concentration.

(b) Such requirement shall also apply, until the Goal is reached, to multifamily housing (including apartments

buildings, rowhouses or townhouses) built in any zoning district of East and Northwest Yonkers (not currently toned MG, M, A, B or BA) where multifamily housing may hereinafter be built pursuant to rezoning, special exceptions or otherwise.

(c) Notwithstanding paragraphs (a) and (b) hereof and anything set forth in the First Decree, the City may exempt from such requirement any multifamily housing development of fewer than ten units; provided, however, that such exemption shall not be applied to circumvent (by, for example, artificially subdividing one housing development into several developments of fewer than ten units) this Plan's purpose of requiring that multifamily housing in East and Northwest Yonkers otherwise contain at least 20 percent of assisted units.

SECTION 3. *Affordability Criteria.*

The term "affordable", as used in Section 15 of the First Decree, means, with respect to each income category described in such Section, assisted housing units (i) sold at a price entailing a monthly carrying cost (assuming a 10 percent downpayment, a 30-year self-liquidating mortgage, and including principal and interest payments, property taxes, homeowners association fees, but excluding utilities) not exceeding at any time 28 percent of the annual gross income of the household occupying the assisted unit or (ii) rented at a rent (including an allowance for utilities) not exceeding at any time 30 percent of the annual gross income of the household occupying the assisted unit.

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SECTION 4. *Term Transfer Restrictions and Occupancy Criteria.*

(a) Assisted housing units shall be rented or sold only to households meeting (at the time of rental or sale) the income qualifications contemplated in Section 15 the First Decree, as from time to time adjusted for the New York Metropolitan Area. Such units shall be the primary residence of the occupants.

(b) All assisted housing units subject to purchase shall have resale-price limitations (enforced by covenants running with the land, restrictions on registration of title, or any other appropriate legal mechanism approved by the City) which will ensure that for a period of thirty years from the time of their first sale such housing units are sold or resold only to, and at a price affordable to, a household which is, at the time of purchase, in the same income group (referred to in Section 15 of the First Decree and as at that time adjusted) as was the seller at the time such previous owner first occupied the unit. Such resale-price limitation may be amended by consent of the parties or motion to the Court if future experience with financing sources and/or income-qualified owners of assisted units should demonstrate the practical advisability of reformulating the applicable resale-price limitation.

(c) The owner of assisted housing units for rent shall be required to assure that, for a period of thirty years from the time of first rental, such units are affordable to, and are rerented only to, a household which is, at the

time of re-rental, in the same income group (referred to in Section 15 of the First Decree and as at that time adjusted) as was the previous tenant at the time such previous tenant first occupied the unit. Assisted units for rental may be converted to units for sale subject, however, to the income ownership eligibility standards as applicable to units for sale for the remainder of the thirty-year period from original occupancy referred to in the previous sentence.

(d) The affordability and other restrictions on resale and/or occupancy shall not apply to (i) the transfer of ownership of an assisted unit between spouses or former spouses ordered as a result of a judicial decree of divorce or separation agreement (not including transfers to third parties), (ii) the transfer of ownership of a unit between family members as a result of inheritance, and (iii) formerly HUD-insured multifamily projects which, following default on the mortgage, HUD acquires or is mortgagee in possession ("MIP"), to the extent that the provisions are inconsistent with applicable HUD statutes and regulations regarding management or disposition of HUD-owned projects or projects for which HUD is MIP; provided, however, that transfers referred to in clauses (i) and (ii) do not extinguish such restrictions (whatever be the legal mechanism through which the restrictions are enforced) which shall be fully complied with in the event of any subsequent sale or rental of a unit not specifically exempted hereby. An exempted transfer as heretofore provided in paragraph (d) shall not toll the running of the thirty-year period referred to in paragraph (b) hereof.

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(e) This Section shall not be interpreted as in any way affecting or diminishing, and shall apply together with, occupancy criteria (to be applied in good faith by the City or each developer) substantially of the type set forth in 24 C.F.R. §960.205 to ensure that the personal and financial background of each potential tenant or owner of assisted units will not be detrimental to the viability of the housing development.

(f) To the extent not inconsistent with other applicable occupancy and financial criteria, the City shall endeavor to give occupancy priority to:

1) persons who, between January 1, 1971 and the date assisted housing pursuant to this Decree is made available, have been residents of public or subsidized housing in the City or Yonkers. Such persons shall be given the first opportunity to apply for such housing, which opportunity shall be afforded up until thirty (30) days following the date the final assisted housing units pursuant to this Decree are made available. Occupancy choice from among such persons applying shall be on a first-come, first-served basis;

2) residents of the City of Yonkers; and

3) persons employed in the City of Yonkers.

(g) The Implementation Office (as defined in Section 11 below) shall be responsible for pre-screening applicants who wish to occupy (as tenants or purchasers)

assisted units and for maintaining a list of such pre-screened applicants. Owners or developers of housing projects containing assisted units may be allowed to select tenants or purchasers of assisted units from among the applicants pre-screened by such Office. The Implementation Office shall be responsible for monitoring the good faith application of any discretion vested in such owners or developers with respect to the choice of tenants or purchasers of assisted units.

(h) Within thirty (30) days of the date the Implementation Office assumes its responsibilities, it shall prepare occupant pre-screening procedures and criteria and submit the same to the Court and parties for review. The parties shall then meet, within 15 days thereafter, with a representative of the Implementation Office to attempt to reach agreement on a final set of procedures and criteria. If such an agreement cannot be reached, the parties shall submit the matter to the Court for resolution.

SECTION 5. *Home Ownership to be Fostered.*

The Court finds that it is desirable to foster home ownership among the occupants of assisted housing units. Accordingly, the City shall endeavor to establish such Mandated Incentives as will tend to foster the production of assisted housing for sale and shall establish a program to apply available local, state and federal subsidies to the write-down of purchase costs by eligible purchasers of assisted housing units. Notwithstanding the foregoing, no proposed housing development containing assisted units shall in any

way be disfavored in negotiation with the City for a particular mix of Mandated Incentives, or be delayed or hampered in its applicable approval process solely because it proposes to offer assisted housing units for rental rather than for sale.

SECTION 6. *Architectural Integration.*

Developers shall make no locational distinctions between assisted and other units, provided that for any building eight or more stories in height, the top two floors may be reserved for market rate units. Assisted units, whether for sale or rental, shall meet HUD minimum property standards with respect to square footage. Assisted units need not be furnished with each and every amenity as a developer may choose to include in a market rate unit.[2] The City shall foster (to the extent feasible) the use of such architectural and design devices as will minimize the visual impact of such housing developments on the surrounding community and any distinction between assisted and market units.

SECTION 7. *Staging.*

Assisted units in any housing development shall obtain certificates of occupancy no later than according to the following schedule:

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2. Without limitation, the term "amenities" is intended to encompass items such as: custom-finished basements; fireplaces; customized kitchens; specialized finished, flooring, or fixtures, etc.

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Percentage of Market Rate Units Receiving Certificates of Occupancy	Percentage of Assisted Units Receiving Certificates of Occupancy
Up to 25%	0% (none required)
25% + 1 unit	At least 10%
50%	At least 50%
75%	At least 75%
100%	100%

SECTION 8. *Mandated Incentives.*

Consistent with Section 17 of the First Decree, the City shall provide appropriate Mandated Incentives to attract private development of assisted housing units. The type, extent and combination of necessary Mandated Incentives to be utilized with and given to a particular developer of multifamily housing may depend, among other things, on the allocation to specific income groups of assisted units which the developer (subject to the terms hereof) elects to make, the degree to which assisted financing may be available, prevailing economic and housing-market conditions, and the developer's business expectations. Accordingly, the City should be allowed discretion to establish with each developer of multifamily housing a mix of Mandated Incentives which would encourage construction, notwithstanding the financial burden associated with the inclusion of the required share of assisted units. However, the City shall exercise such discretion in good faith to encourage the timely attainment of the Goal. The examples set forth below illustrate the types of Mandatory Incentives which the City shall be prepared to implement:

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Example 1. Increase the maximum permitted Height of a Building.

Example 2. Increase the maximum permitted Floor Area Ratio of a Building.

Example 3. Change the formulas set forth in Section 107-55(B) of the Yonkers Code for the calculation of floor-area ratios for mixed-use buildings so as to lower the contribution of stories devoted exclusively to non-residential uses.

Example 4. Reduce the minimum permitted Lot Width or Lot Area for apartment houses.

Example 5. Reduce the minimum permitted Lot Area per family.

Example 6. Reduce the minimum permitted Rear Yard or minimum permitted Front Yard.

Example 7. Grant the owner of multifamily rental housing a full tax abatement on City real-estate taxes for the percent of units which are assisted but not to exceed 50 percent of the total number of units in the development including both assisted and non-assisted units. The benefits of the tax abatement to the non-assisted units are to be provided to the developer for use in further reducing the rental payments required of the assisted units so as to make them affordable within the defined rental limits.

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Example 8. Vary the extent and/or duration of the incentive referred in Example 7 depending on the extent to which the owner elects to carry a larger than required share of assisted units allocated to households in an income group described in clauses (a) and/or (b) of Section 15 of the First Decree.

Example 9. Grant a tax abatement on City real-estate taxes to households buying assisted units. An additional tax abatement may be granted to up to 50 percent of the total number of units being constructed to be used to skew the monthly payments of the non-assisted units so as to further reduce the monthly payments required of the assisted units.

Example 10. Vary the extent and/or duration of the incentive referred to in Example 9, depending on the household's income level.

Example 11. Waive a portion of all application or processing fees which would otherwise be payable by developers seeking building-related approvals from the City.

Example 12. Grant a zoning overlay in (subject to the proviso in clause (d) of Section 17 in the First Decree) any district not zoned MG, M, A or BA.

Example 13. Cause funds in the AHTF to be applied (subject to applicable orders of this Court and HUD regulations) to site preparation or improvement at a site to be used for the construction of assisted units.

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Example 14. Provide that, notwithstanding anything to the contrary contained in Chapter 107 of the Yonkers Code, a particular housing development may contain a certain number (or percentage) of units in excess of the number which would otherwise have been allowed by such Chapter.

Example 15. Cause the Industrial Development Authority (to the extent it is within the power of the City to cause such result) to provide assisted financing for the construction or permanent financing of the portion of a housing project represented by assisted units.

Example 16. Vary the extent of the assisted financing referred to in Example 15 depending on the extent to which the owner or developer elects to carry or sell a larger than required share of assisted units allocated to households in an income group described in clauses (a) and/or (b) of Section 15 of the First Decree.

The foregoing examples embody the types of steps which (consistent with Section 17 of the First Decree) the City shall be prepared to take, as warranted, to realize the objective of attaining the Goal, as set forth herein and in the First Decree. The illustrations above do not require the City to offer a particular incentive (either as to type or extent) to any particular developer, housing development or owner. Nothing herein shall be interpreted to create in favor of a third party any right to obtain a particular incentive herein mentioned. However, in considering development proposals, the City shall act in a uniform, objective and non-arbitrary manner designed to afford all such proposals a fair opportunity to contribute appropriately to achievement of the Goal.

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SECTION 9. *The Affordable Housing Trust Fund.*

The funds now and hereinafter placed in the AHTF as previously directed by this court shall be expended (to the extent consistent with HUD statutes and regulations governing the application of CDBG funds) on (i) site-improvement projects (i.e. site preparation, sewage works, roads, etc.) for sites on which multifamily housing projects containing assisted units are to be constructed and (ii) to directly assist in the acquisition of property through a Local Development Corporation's activities. In no event shall such funds be made available to private developers to defray construction or carrying costs for assisted units. Affordable Housing Trust funds may also be expended in manners otherwise consistent with HUD statutes and regulations if, in response to specific developer proposals, such other incentives will sufficiently obtain the overall objectives of the Long Term Plan. The City, therefore, shall have the right, upon obtaining Court approval, to use Affordable Housing Trust funds in other permissible manners.

SECTION 10. *Credit Against Goal.*

The City may provide (on a project-by-project basis, on an area-wide basis or otherwise) Mandated Incentives for the construction of assisted units in areas other than East and Northwest Yonkers. The City shall be given a credit of one unit of assisted housing towards the satisfaction of the assisted housing goals set forth in either clause (b) or (c) of Section 15 of the First Decree for every two units of assisted housing (allocated to households in the income group for which credit is claimed) constructed in such areas, up to a

maximum credit of 100 units against each such goal. Such assisted units shall be subjected to the same occupancy, resale, architectural and other restrictions and requirements as assisted units constructed in East and Northwest Yonkers.

SECTION 11. *Expedited Review: Organizational Structure.*

(a) In addition to such other procedures as may be established to render the Mandated Incentives most effective, the City shall establish an expedited review process for housing projects containing assisted units to include priority scheduling and expedited review and negotiation of applicable Mandated Incentives.

(b) The City shall centralize in one administrative department, agency or office (the "Implementation Office") the administration of this long-term housing plan. The Implementation Office shall be a part of the Fair Housing Office created pursuant to this Court's May 26, 1986 Housing Remedy Order and shall be under the direction of the Executive Director of that Office. The responsibilities of such Office shall include acting as an ombudsman before all City agencies which may be involved in the process of approving multifamily housing developments and facilitating the expeditious completion (by such other agency, department or office as may be responsible therefor) of: all reviews and approvals, negotiations with specific developers and grants (if appropriate) of specific Mandated Incentives. Such Office shall also have the power to pre-approve or screen particular proposals, to assist developers in the

application process, to implement a marketing program to make widely known the availability of Mandated Incentives and of assisted units among developers and potential purchasers and tenants of assisted units, and to implement such other administrative steps as may be required or convenient for the more effective realization of the objective of achieving the Goal (e.g. the creation of an advisory board of responsible citizens to assist in the foregoing task); provided that, the Implementation Office shall not exercise the power of other City agencies. Moreover, the administrative and coordinating functions described above shall not require that the City vest in the Implementation Office the final discretionary authority to approve specific projects or to grant specific Mandated Incentives.

(c) The Implementation Office shall remain in existence for the duration of this Decree. The Executive Director of the Fair Housing office shall be responsible for formulating and presenting for approval and funding a budget for such Office, as well as for the hiring and firing of the employees of such Office.

SECTION 12. *"Section 8" Certificates.*

The City shall consider in good faith any plans for assisting eligible families in utilizing their "Section 8" certificates or vouchers which plaintiff or plaintiff-intervenors may at any time hereafter present to the City.

SECTION 13. As specific plans are formulated for the construction of affordable housing, projections for the

additional number of school age children who would occupy Long Term Plan housing developments shall be furnished to the School Board. The School Board shall advise the Court and the parties as to the capacity of the existing school system to accommodate such additional children, whether expansion is required and the impact, if any, of such changes on the School Board's ability to comply with the Educational Improvement Plan.

SECTION 14. If at any time any party to this litigation believes that a proposal for the construction of housing is consistent with and furthers the objectives of the Housing Remedy Order and the Long Term Plan, but requires an exemption from some of the specific provisions contained herein, application may be made to the Court for a waiver or modification of such provisions with respect to that specific proposal.

SO ORDERED:

/s/
Leonard B. Sand, U.S.D.J.
DATE: 6/13/88

APPENDIX 10 — MODIFICATION TO TENANT SELECTION SECTION OF CONSENT DECREE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 22, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 CIV 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH, NAACP, et al.,

Plaintiff-Intervenors,

vs.

YONKERS BOARD OF EDUCATION, et al.,

Defendants.

MODIFICATION TO TENANT SELECTION
SECTION OF CONSENT DECREE

WHEREAS, the parties, having conferred among themselves and with the MHA and FHIO, and wishing to modify the Remedy Order with regard to the selection of tenants for the 200 units of public housing, hereby request approval for the following change:

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1. One-half (100) of the public housing units constructed pursuant to this Order shall be made available to families on the MHA waiting list, consistent with HUD regulations and standards. With regard to the other 100 units, the parties recognize that current residents of public housing have been denied the opportunity to reside in public housing outside of southwest Yonkers and Runyon Heights. Accordingly, wishing to provide current residents of public housing units the opportunity to reside in the newly constructed public housing, the parties agree that:

2. The MHA shall timely publicize to all residents of public housing the option of moving to the newly constructed units. Any family currently in public housing may apply for this opportunity, specifying in rank order his/her locational preference. The MHA shall review all such applications and determine which tenants meet HUD qualifications for such housing and whether with respect to any location, there are more interested current tenants than apartments available.

3. Should the number of current tenants interested in and qualified for any newly constructed building exceed the number of available units thereat, the MHA shall sponsor and conduct a public lottery to select tenants for each of the newly constructed buildings. In this process, each family eligible to participate in said lottery shall be entitled to equal consideration.

4. Should the number of current tenants interested in and qualified for residency in new public housing not exceed the number of available units (100), the MHA shall assign

current residents to the newly constructed public housing, honoring, to the extent possible, the locational desires of the tenants.

5. Should insufficient current tenants be interested in occupying one-half the apartments in any new building, remaining apartments shall be made available to persons on the waiting list.

6. In filling vacancies which occur after the initial tenant selection for the 200 public housing units, the MHA shall maintain two lists of interested families: those who occupy currently extant public housing located in southwest Yonkers and Runyon Heights and who express an interest in moving to such public housing locations and those who do not. The MHA shall offer in an alternating manner available apartments built pursuant to this Decree to eligible families from these two lists.

SO ORDERED.

s/ Leonard B. Sand
UNITED STATES DISTRICT
COURT
8/22/91

APPENDIX 11 — SUPPLEMENTAL LONG TERM PLAN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK ADOPTING ADDITIONAL REMEDIAL MEASURES DATED OCTOBER 5, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

80 CIV 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH — NAACP, *et al.*,

Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION, *et al.*,

Defendants.

SUPPLEMENTAL LONG TERM PLAN ORDER
ADOPTING ADDITIONAL REMEDIAL MEASURES

On May 28, 1986, the Court entered the Housing Remedy Order ("HRO"). Part VI of the HRO required the defendant City of Yonkers ("City") to submit to the Court a plan for the creation of subsidized housing, in addition to the 200

units of public housing, to be located in east and northwest Yonkers. The City failed to submit a plan. On January 28, 1988, the Court entered the First Remedial Consent Decree in Equity ("First Decree") providing for the implementation of parts IV (public housing) and VI (additional subsidized housing) of the 1986 Housing Remedy Order. With respect to subsidized housing, the First Decree provided for a goal of 800 units of assisted affordable housing to be provided on a mixed use basis with market rate housing developed through private sector initiatives coupled with Mandated Incentives. On June 13, 1988, the Court entered the Long Term Plan Order (LTPO) further implementing the 800 unit goal of the First Decree and providing for a mix with market rate units on an 80/20 basis.

Due to actions and omissions by the City of Yonkers and changes in the housing market in Yonkers, this Plan failed to provide the required housing. Therefore, on June 5, 1991, plaintiff-intervenors moved the Court for entry of an order granting additional relief to require the City to provide for the construction on City-owned sites of 800 units of affordable housing in east and northwest Yonkers as envisioned by the First Decree. Plaintiff United States supported that motion. On July 8, 1991, the defendant City of Yonkers filed a cross-motion to modify or vacate the First Decree and Long Term Plan Order.

At a hearing held on July 15, 1991, the Court invited the City to submit a proposed alternative Long Term plan to meet the objectives of the Housing Remedy Order. The plan submitted thereafter by the City was not acceptable. On September 25, 1991, the Court advised the parties that the

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Fair Housing Implementation Office ("FHIO") was identifying sites for new construction of affordable housing and seeking to obtain control of possible sites through options and delayed ruling on the alternative Long Term Plan proposals pending FHIO's completion of its efforts.

On February 25, 1992, the Court urged the parties to submit any proposals for modification of the current Long Term Plan to the Court at the time the FHIO submitted its report of available sites. On April 14, 1992, the Yonkers City Council, by a 4-3 vote, adopted Resolution 83-1992, approving the Yonkers Alternative Housing Plan (YAHP), a plan relying primarily on the use of existing housing to fulfill the requirements of the Long Term Plan Order. Subsequently, the parties were unable to agree on the terms of an Order to submit to the Court based upon Resolution 83-1992.

Consequently, on June 9, 1992, the City of Yonkers moved the Court to amend its cross-motion to vacate and further moved the Court to enter its proposed Modified Long Term Plan Order. The United States and plaintiff-intervenors submitted their own proposed orders which sought to rely more substantially on new construction to meet the LTPO requirements. At a hearing on July 25, 1992, the Court deferred ruling on any of the motions, but instead granted, at the City's request, a four-month trial period during which the City was to demonstrate the feasibility of its proposal. The Court also ordered that the FHIO should continue its efforts to acquire options on possible sites for the construction of assisted housing during the City's demonstration period.

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In November 1992, the Court granted the City's request for an additional four months, until March 15, 1993, to complete its trial project. At the end of this additional period of time, the Court announced its intention to hold evidentiary hearings in which it would hear testimony concerning the City's proposal to use existing housing and alternative proposals to rely more heavily on the use of new construction. Specifically, in early 1993, the FHIO submitted a report to the Court and the parties presenting a "menu of alternatives," which relied primarily on construction of new housing on approximately 9 privately-held sites for which it had obtained options and on approximately 8 additional City-owned sites. The FHIO report projected that only 30 existing housing units could be obtained per year.

The Court held a bifurcated evidentiary hearing during the period from June 10 through July 6, 1993. The first stage focused on the city's proposal to provide 450 LTPO units over a four year period through the use of existing housing. Following that phase of the hearings, the Court delivered its Opinion on June 16, 1993. Transcript at 813-835.

The Court found that existing housing was an appropriate resource that should be utilized to the maximum extent possible for LTPO purposes. However, the Court concluded that the city's projections for the probable success of this approach were inflated and that political pressures caused the City to make choices which limited the potential effectiveness of this program. The Court further found that the existing housing program must be modified in certain respects (as embodied in this Order) to improve its likelihood

of success. The Court determined that, during the next four years, it was reasonable to expect that, at most, 250 units of existing housing could be made available to class members.

At the second stage of the proceedings, the Court heard evidence concerning the best means of fulfilling the remainder of the LTPO goal of 800 units of affordable housing. The City proposed construction of limited densities on four specific sites. FHIO, generally supported by the Department of Justice and the NAACP, presented specific design concepts, including densities, bedroom distributions, projected income ranges of occupants and designs for some seventeen identified sites for which it either had signed options to purchase or had determined municipal ownership. Following some 6 days of hearings and an inspection of the majority of the sites by the Court (with the consent of the parties), the Court delivered a second opinion on July 13, 1993. Transcript at 1909-1951.

The Court rejected the city's proposed new construction program as too limited in scope and determined to embark on a course to test the viability of the FHIO major site proposals. The Court announced that it believed initial pre-construction activity should focus on three specific sites, Yonkers Avenue, Cross Street and Hoover Road. Both FHIO and Yonkers had identified the first two of these sites for long term housing. Based on the evidence, the Court indicated its preference for the densities and design concepts proposed by FHIO on each site.

To provide further specific direction for this phase of LTPO implementation, the Court hereby Orders the following

with respect to further remedial proceedings. To the extent that any divergence exists, either specifically or by implication, between the terms of this Order and the provisions of the LTPO, the following terms shall govern the proceedings:

I. *HOUSING SPECIAL MASTER*

To facilitate implementation of the LTPO the Court shall designate a Housing Special Master ("HSM") pursuant to Rule 53 of the Federal Rules of Civil Procedure. In the event that no such designation has been made by a deadline set forth herein, the function assigned to the HSM shall be performed by the Court or its designee.

II. *NEW CONSTRUCTION*

A. *Process for Soliciting Developer/Builders*

1. In cooperation with the parties, FHIO is hereby authorized to complete required State and Federal environmental reviews of the Yonkers Avenue, Cross Street and Hoover Road sites, assuming densities of 98, 28 and 48 units respectively. FHIO shall furnish to the parties draft environmental audits, including any required cumulative impact statement, no later than October 31, 1993. Any party wishing to comment on any aspect of said environmental reviews shall do so in writing to the HSM designated hereunder by November 15, 1993.

2. Commencing upon designation of the HSM, the FHIO and the parties shall regularly meet together with HSM to

discuss and, to the maximum extent possible, agree upon the details of site design, environmental impact, sequencing of events and site development for the three new construction sites.

3. The parties shall agree upon and submit to the HSM RFPs seeking developer/builders for the three sites no later than November 15, 1993. The parties shall also agree to a process and criteria to be used in rating and ranking the RFP submissions. If the parties are unable to agree upon any of the terms of the RFPs or such processing criteria, the HSM shall resolve the dispute with any dissenting party having the right to appeal the Master's decision to this Court. Copies of the RFPs shall also be furnished to the Yonkers Planning Board and the Yonkers Zoning Board of Appeals.

4. Within 45 days of issuance of the RFPs, responses shall be submitted to the HSM who shall promptly duplicate the submissions and provide the same to the FHIO and the parties. Copies of the responses shall also be furnished to the Yonkers Planning Board and the Yonkers Zoning Board of Appeals. Within 15 days of receipt of the submissions, the Yonkers Planning Board and Yonkers Zoning Board of Appeals may submit their comments to the HSM.

5. Within 30 days of receipt of the submissions, the HSM, FHIO and the parties shall evaluate the proposals received on the basis of the established rating and ranking system.

6. Within 45 days of receipt of the submissions, the HSM shall inform the Court of the preferred developer/

builders selected by the HSM, the required mandatory incentives, and any further deviation from municipal zoning or variances required by said developer/builder.

7. Within 15 days thereafter, any dissenting party may submit to the Court its alternative preference, as well as any comments concerning the preferred developers and any terms it has proposed.

8. If there is a dissenting party, the Court shall resolve the dispute and make the final selection, and may order provision of the Mandated Incentives and any zoning changes or variances necessary for construction of the project. If there is no dissent, the HSM may make such determination and issue such Order.

B. *Site Control*

9. The City of Yonkers currently has title to the Cross Street site. No further action of this court is required to permit the preferred developer to acquire title to and develop this site.

10. FHIO currently holds an option to purchase the Hoover Road site. By December 1, 1993, Yonkers shall either enter into an option to purchase the Yonkers Avenue site envisioned by FHIO for development of its proposal or advise the Court that it has been unable to enter such an option agreement. In such instance, within fifteen days (15) of the selection of the preferred developer/builder for the Yonkers Avenue site, Yonkers shall initiate eminent domain proceedings in Supreme Court of the State of New York,

County of Westchester. Subject to HUD approval, which shall be explicitly given or withheld within thirty (30) days of HUD's receipt of a Request for Release of Funds, options shall be exercised for the Hoover Road site and the Yonkers Avenue site within forty-five (45) days after selection of the preferred developer/builder for that site. Alternatively, the City of Yonkers may acquire the Hoover Road site by initiating eminent domain proceedings provided such proceedings are initiated within ten (10) days of the selection of the preferred developer/builder for that site. If Yonkers chooses to initiate such proceedings, it shall promptly notify the HSM, the FHIO, and the parties, that it has done so. Affordable Housing Trust Fund monies may be used for these purchases, provided that the developer/purchaser shall be required to compensate FHIO for transferring title to these sites as per its Reply to the RFP.

11. FHIO is directed to maintain in full force and effect the various options on other privately held sites it has heretofore negotiated. FHIO shall report to the HSM and the parties every four (4) months on the status of the options and advise of any actions necessary to maintain the availability of optioned sites, as appropriate. No option shall be exercised without approval of the Court.

III. *ADDITIONAL NEW CONSTRUCTION*

A. *Additional Sites*

During the evidentiary hearing which concluded with this Court's Opinion of July 13, 1993, the Court identified a number of other sites which appear suitable for the

development of additional long term plan housing. Indeed, all the sites proposed by FHIO have promise to this end, some more than others. At the same time, the Court notes that FHIO's analysis of these sites was admittedly preliminary and does not allow a firm conclusion that each is buildable.

Accordingly, the Court directs that by May 15, 1994, the HSM shall present a revised schedule for the second and third year development with sufficient information concerning any site proposed for inclusion to insure the environmental feasibility of said site and its reasonably prudent development, taking into account the availability of needed subsidies, the reaction of the development community to the first set of RFPs and the results of the existing housing program to that date. By June 14, 1994, any party wishing to comment on the proposed development schedule or offer specific alternatives may do so. The Court contemplates the issuance of another Supplemental Order in light of the information then and so received.

B. *Small Site New Construction*

The HSM shall develop further FHIO's proposal for a small site new construction program and report to the court and the parties on the viability of such a program by April 1, 1994.

C. *Transfer of Responsibilities for New Construction*

At the conclusion of the hearing on new construction proposals on July 13, 1993, the Court noted that the

implementation of this aspect of the Long Term Plan was far beyond the capacity of the FHIO alone. Thus, the Court expressed a desire for the FHIO to avail itself to the maximum extent possible of the services and technical assistance of national and local organizations experienced in the development of affordable housing. In addition, the Court believes that it may be appropriate that primary responsibility for implementation of the new construction component of the Long Term Plan be gradually transferred to an entity which has the requisite resources and expertise to successfully carry out this program.

Accordingly, the HSM may, after consultation with the parties and HUD, designate a third party for purposes of implementing the new construction component of the Long Term Plan. The HSM also may submit a Proposed Order appointing the implementing entity of the new construction program and setting forth the duties and responsibilities of this entity. Any party which dissents from this recommendation may submit its own nomination for the implementing entity and the dispute shall be resolved by the Court. By Supplemental Order, the Court will appoint the implementing entity for the new construction program and delineate the specific responsibilities and means for funding the activities of this entity. The Court contemplates that this Supplemental Order also will specify what areas of Long Term Plan responsibility will remain with the FHIO. In the interim, the FHIO will function consistent with this Order and, to the extent not dealt with herein, the prior Orders of this Court.

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IV. *EXISTING HOUSING*

Existing housing resources (including, but not limited to, cooperatives, condominia, apartments, attached and detached single family units) should be utilized to the extent available to meet the Long Term Plan requirements. After the evidentiary hearing in June 1993, the Court established a goal of 250 existing housing units during the next four years. The Court set forth a schedule which sets the following annual goals:

Year 1 – 20 units
Year 2 – 70 units
Year 3 – 80 units
Year 4 – 80 units

The Court further ordered that: (1) existing units shall be made available for rental and ownership opportunities; (2) aggressive efforts should be made to identify and acquire blocs of condominium and cooperative units; and (3) the financial interests of beneficiaries should be protected by locating units only in fiscally stable buildings or by some other appropriate mechanism to the extent that other units are utilized.

1. The HSM may, after consultation with the parties and HUD, designate a third party for purposes of implementing the existing housing component of the Long Term Plan. The HSM also may submit a Proposed Order appointing the implementing entity of this program and setting forth the duties and responsibilities of this entity. Any party which

dissents from this recommendation may submit its own nomination for the implementing entity and the dispute shall be resolved by the Court.

2. If an entity is designated pursuant to Subparagraph III-C above, it shall report to the HSM and parties monthly concerning its progress and shall be obliged as well, to report any obstacle being placed in its way by any party or non-party.

V. *HOUSING COUNSELING SERVICES*

By November 1, 1993, the FHIO shall develop a proposed housing counseling program and submit such program to the HSM and the parties. The HSM shall report to the Court concerning the adequacy of the proposed program and the desirability of retaining these functions within the FHIO.

VI. *AFFORDABLE HOUSING TRUST FUND*

Yonkers is an eligible recipient of CDBG funds, much of which may be used in a manner supportive of the LTPO. In past years, up to 25% of such funds have been reserved for the Affordable Housing Trust Fund (AHTF) and purposes enumerated in prior Court Orders. Due to the failure to achieve results to date, the continuing need for such monies to implement the LTPO is apparent. For example, the *pro forma* submitted for the Yonkers Avenue new construction site, as well as for others contemplated for development in succeeding years, show a need for millions of dollars from

this source. In addition, site specific planning activities for the three identified sites, and others planned for development in subsequent years, will require financing.

Accordingly, beginning with FY 1994 and continuing until further order of this Court, 25% of the City of Yonkers' annual CDBG funds shall be allocated to the AHTF. Such funds shall be available for implementation of the new construction, existing housing and housing counseling programs and, if the amount exceeds $500.00, shall be accessed by application to the Special Master who shall make recommendations to the Court. Any such application shall reference the particular proposed expenditure as well as its rationale. Any party shall be permitted to seek modification of this allocation upon a showing that the remedial program has been implemented or that such funds are not needed for implementation of the LTPO.

VII. *BENEFICIARY LISTS*

Section 4(f) of the LTPO establishes priority for housing opportunities first to persons who have resided in public or assisted housing in Yonkers since 1971 and then to residents of the City and finally to those who work in Yonkers. Within each priority group, the LTPO provides preference to those first seeking assistance. FHIO has a list of approximately 950 beneficiaries in need of its services.

In the spring of 1993, the City of Yonkers began assembling its own list of potential beneficiaries. There is no record evidence establishing the overlap of the two lists.

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To the extent FHIO-listed beneficiaries first sought housing opportunities by placing themselves on the FHIO list, equity dictates that their housing needs take preference. At the same time, persons who later placed their names on Yonkers' should not be penalized. The two lists must be harmonized to accord persons preference both in terms of the afore-cited priorities and the time each person has been awaiting a housing opportunity. To this end, the City shall forthwith provide FHIO with its list and FHIO shall promptly create a single list of ranked beneficiaries which it shall maintain and update. FHIO shall make this list available, upon request to the agency or administrator responsible for the existing housing program and the selected developer/ builder of the three new construction sites. Both the City and FHIO shall make documents and information concerning potential beneficiaries and beneficiaries available to the HSM, the Court, and the parties, who shall also maintain such confidentiality.

SO ORDERED.

Dated: New York, New York
October 5, 1993

s/ Leonard B. Sand
U.S.D.J.

APPENDIX 12 — TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED NOVEMBER 6, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 6761(LBS)

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH, NAACP, et al.,

Plaintiff-Intervenors,

v.

CITY OF YONKERS, et al.,

Defendants,

and

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SAMUEL PIERCE, SECRETARY,

Added-Defendants.

Appendix 12

November 6, 1996
4 o'clock p.m.
New York, N.Y.

Before:

HON. LEONARD B. SAND,

District Judge

* * *

[2] * * *

(In open court)

THE COURT: Good afternoon. I think one cannot have a clear understanding of the proceedings this afternoon without a statement of history, and although as I look around the room I believe almost everyone here is familiar with the history, it may serve a useful purpose to restate it.

Many months ago — too many months ago — it became apparent to the Court and to the parties that an amendment of the existing orders with respect to the construction of affordable housing was appropriate for two clear reasons. One is that it wasn't working. It was broke; it had to be fixed. And the other was that the mayor of Yonkers, with the support of the city government itself, was urging that if given the opportunity it could carry out the obligations with respect to the provision of affordable housing more effectively, expeditiously, less expensively than was occurring under the existing regimen.

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[3] So there began, for the most part without any court participation, the process of discussion among the parties in the hope of achieving a consensus as to the terms of a revived housing order.

And there was a quid pro quo. The quid pro quo was the city's acceptance of its obligations to create affordable housing and to do so in good faith and expeditiously in exchange for which or as a part of which the city would be given the full and prime responsibility for the implementation of the order, with the understanding of course that the Court, primarily through the Housing Special Master as well as by the Court itself, would monitor what was occurring and would reserve the jurisdiction to step in at any time if it appeared that goals were not being reached or were not likely to be reached as anticipated.

The Housing Special Master's role would be a monitoring role rather than an operational role. FHIO would be phased out and goals were assigned to be met by the city.

One might say: Why did it take so long? And I am satisfied that it took so long not because any lack of diligence on the part of the parties to the negotiation. But you know, it is so much more difficult to achieve agreement than it is to be contentious. But contention doesn't build housing.

The Court from time to time considered simply [4] entering an order, and indeed advised the parties, I know on at least two occasions, that if did there not appear to be a real prospect for consensus the Court would simply enter an order.

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Which brings us to last week when I did receive from the parties the text of an agreement — the text of a second supplemental Long Term Plan Order, the last paragraph of which read "The forgoing provisions have been negotiated and agreed to by the parties to implement remaining aspects of the Housing Remedy Order and the Long Term Plan Order."

That agreement contained provisions some of which the Court had decreed, for example, those with respect to School 15, and some of which the parties had agreed upon as a result of their negotiations.

I found that draft for the most part entirely satisfactory. I made some revisions which were circulated among the parties and have made some on the minor adjustments to the agreement, copies of which the parties have.

Am I correct in assuming that the Second Supplemental Long Term Plan Order as is now drafted meets with the approval of all the parties? Mr. Fitzpatrick?

MR. FITZPATRICK: Yes, your Honor, your recitation of the history of this matter over the past ten months is accurate and the city supports entry of the order [5] as the fruits of our negotiation as well as the various other matters that the Court has directed over the past several months.

We concur.

THE COURT: Mr. Sussman?

MR. SUSSMAN: Yes. Judge, I'm aware that not from getting it but because I saw it in your chambers earlier a 11/49 of letter which was signed by certain members of the branch.

Just so the record is clear, on October 22, 1995 I met with a quorum of the executive board of the branch at the direction of general counsel, Dennis Hays. At that time, your Honor, two matters were discussed. I read each and every sentence of the agreement as it then stood. The branch executive board unanimously agreed with the agreement as it then stood and authorized me to enter into an agreement that had nonmaterial changes.

I've reviewed the changes since from Dr. Pastore which came I think it was last week as a result of further discussions we had and also the changes today, Judge, that you have suggested. I view those entirely as nonmaterial and if anything as supporting the plaintiff's position and feel that we are authorized to enter into the agreement.

THE COURT: Ms. Houk?

MS. HOUK: The United States agrees with the [6] changes that the Court has made to the order and agrees with the comments by Mr. Fitzpatrick that the Court's recitation of the history accurately reflects what the parties have tried to do and the additional language that the Court has proposed is consistent with what we were asking the Court to do at this time, so we agree with entry of the order as well.

THE COURT: I will sign the order.

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Let me make a few other comments. Obviously the signing of an order, even an order which everyone has agreed to, doesn't create housing. So there is much that has to be done during the transition. I say this particularly with respect to FHIO. There is a turnover that has to take place, and I have every reason to believe that that will take place in good spirit, in good faith, and with a recognition of the fact that the objectives of all parties involved is the same, and that is making affordable housing available to the members of the class.

I'd like to say something with respect to Karen Hill because I think it's appropriate that I do so.

This case in its long history has had heroes and scapegoats. There was a time when Oscar Newman was a favorite scapegoat and became a lightning rod for the Court. But you know when one looks back, I get a lot of mail, but I've never received a letter which criticizes the design or [7] the construction or the siting of the public housing, and I think that should be recognized.

Well, Karen Hill has been blamed in the media and elsewhere for many things for which her office had absolutely no responsibility. There is no real utility in summoning up the reasons why prior expectations were not realized, but the Court has personal knowledge that during periods of prior administrations — and I make that very clear, periods of prior administrations — and I think I've said this before, it was necessary for the Court to intervene to get stationery for FHIO.

She and her staff worked under very difficult circumstances. Part of the reason for the failure may very

well be, and I will take personal responsibility for this, that the concept of having within the city government someone or some group whose primary responsibility was to report to the Court didn't work well.

Well, that's going to be ended now. January 15th the activities of FHIO pass over to the city, and, Mr. Mayor, if there's scapegoating to be done it will be you and me, and I hope that that doesn't happen. I hope that what happens is that everybody is pleased with the fact that at long last, in a constructive way, the housing is going to be built or made available.

I'd like particularly to thank you Marilyn [8] Melkonian and Dr. Pastore for the critical role that they played in working on this agreement. I know that Ms. Melkonian personally is pleased to have her role and the role of her office recognized as a monitoring role, a reporting role to the extent specifically set forth in the order I am to sign, not an operational role.

With respect to Dr. Pastore, he's not here today. He's not here today because he has had some medical problems and we are very, very pleased that he is well on the way to recovery. And when I talked to him and tried to find out how he's doing his response was: What else can I do to help? And I always find something else that he could do to help, and he takes on burdens willingly and with results which get everyone's approval and gratitude.

Is there anybody who wishes to be heard or anything further?

AUDIENCE MEMBER: Yes.

THE COURT: Ma'am, I see that your hand is raised and I'm not sure who you are but I would imagine that you are somebody who has forwarded to me a document called Comments for Class Members, which I have read. I read, and perhaps it is counterproductive for me to say this but I do read everything that's sent to me.

I think the concerns that have been expressed which properly fall within the scope of this order have been [9] fully considered by the Court and by the parties. It is not easy — and I know I've said this many times — it's not easy to represent a group as distinguished from a particular individual or even a particular interest, so that I understand that there are differing views not everyone may be satisfied with the process and the procedures that have been followed. But as I said at the very outset, this process has been going on for a long time, and Mr. Fitzpatrick quantified it for me, ten months, and I don't think it's appropriate for this proceeding to turn into an open meeting for expression of views of the Yonkers branch. The Yonkers branch speaks to the Court through counsel and so for that reason, with all respect, I'm not going to call on you.

Anyone else? Anything else?

We are adjourned. Thank you.

(Proceeding adjourned)

* * * *

APPENDIX 13 — SECOND SUPPLEMENTAL LONG TERM PLAN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED NOVEMBER 6, 1996 AND FILED NOVEMBER 7, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

YONKERS BRANCH — NAACP, et al.,

Plaintiffs-Intervenors,

– v. –

YONKERS BOARD OF EDUCATION, et al.,

Defendants.

SECOND SUPPLEMENTAL LONG TERM PLAN ORDER

On October 5, 1993, the Court entered the Supplemental Long Term Plan Order Adopting Additional Remedial Measures ("SLTPO"). The SLTPO was entered following several weeks of evidentiary hearings during which the parties presented various proposals to further the implementation of the 1986 Housing Remedy Order

("HRO"), the 1988 First Remedial Consent Decree in Equity ("1988 Consent Decree") and the 1988 Long Term Plan Order ("LTPO").

In order to further the implementation of the remedy orders in this case, the Court enters this Second Supplemental Long Term Plan Order. To the extent inconsistent with prior orders of the Court, the following provisions shall govern.

Whereas, the City of Yonkers has committed itself to undertake implementation of the SLTPO and LTPO, as amended herein, in good faith and has asked in return that primary responsibility for the creation of affordable housing pursuant to these plans, as modified, be vested in the City, and,

Whereas, it is the purpose and intent of all parties and of the Court to place such responsibility in the hands of the City subject to monitoring by the Court and its designees, with the reservation of jurisdiction in the Court to intervene and further modify this order should it appear that the goals set forth herein are not being realized and are not likely to be realized within the time periods set forth herein. It is therefore,

ORDERED that:

1. **First Year Construction:** The parties agree that new construction shall expeditiously proceed on Cross Street (22 units), Hoover Road (25 units) and Yonkers Avenue (64 units of rental housing). The Housing Special Master (HSM) shall be responsible for insuring that the City prepares

each site for the commencement of construction in a timely manner. The City of Yonkers shall fully cooperate with the developers previously selected for each of these developments and shall be responsible for overseeing construction activities on each site.

2. **Annual Objectives:** In addition to the new construction set forth in paragraph 1, for each of the six calendar years commencing January 1, 1997, the City of Yonkers agrees that it shall provide at least 100 units of affordable housing to LTPO qualified individuals. In providing said units, the City shall rely upon existing housing and/or new construction. The provision of an existing affordable housing opportunity, as defined in paragraph 6, below, shall count as a unit of affordable housing. Should the City fail to meet this objective in a timely fashion, as set forth above, it shall be responsible for meeting any shortfall during the following year, as well as achieving that year's objective. In no event shall the City of Yonkers be deemed to have complied with this order before providing the 600 affordable housing units as defined in this paragraph and the units called for in paragraph 1 hereof. Upon attainment of the objectives of paragraphs 1 and 2 of this Order, the City shall be deemed to have achieved all of the requirements of the 1988 Consent Decree, LTPO, SLTPO and part VI of the HRO.

3. **Sites for New Construction:** The HSM has recommended and prioritized specific sites for new construction as set forth in her report dated March 1, 1996. In meeting the objectives set forth in paragraph 2 with new construction, the City agrees to use such sites so identified

for new construction in the sequence heretofore established unless it proposes in a timely manner other sites or sequences for approval by the Court. The City shall be responsible for insuring the availability of the sites so identified for the new construction of affordable housing, including the optioning of such sites. To the extent site, planning and financing considerations permit, newly constructed units shall be in construction which includes market rate units, *i.e.*, there is a preference for mixed income rather than all assisted housing.

4. **Use of School 15 site:** Within thirty days of the date of this Order, the City shall designate specific sites and densities for sites in Northeast Yonkers sufficient to construct 34 units of housing, at least one half of which shall be affordable. The plaintiffs shall file comments on such designations within fifteen days and the Court shall thereafter determine any outstanding issue. Should the City not so proceed to designate alternative sites within this time period or should the Court not find said designations acceptable, the School 15 site shall remain in the inventory of housing sites to be used for that purpose. The time requirements cited in this paragraph are not intended to foreclose any good faith effort toward compliance with this provision which may require a reasonable extension of time as granted by the Court. Upon designation of alternative site(s) for the School 15 site and the approval of said alternative(s), the City shall forthwith commence planning and construction of said units and may thereafter proceed to use the School 15 site for education purposes. The affordable housing units so constructed shall count toward the January 1997 – December 1997 objective of 100 units.

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5. **Definition of Affordable Units:** Paragraph 15 of the 1988 Consent Decree and paragraphs 1(b) and 3 and 4(a) and (c) of the LTPO are altered as follows: as defined herein, "affordable housing" is intended to mean units which persons at between 0-100% of Westchester County median income can rent or purchase by expanding no more than 30% of their gross annual household income (or such higher percentage as permitted by the applicable housing finance program). The units provided herein shall be distributed as follows: 30% for households earning less than 50% of Westchester County median income; an additional 45% for households earning between 50 and 80% of Westchester County median income; and an additional 25% for households earning between 80-100% of Westchester County median income. Each new construction project of more than twenty units shall apportion its affordable units in the ratios set forth above. Housing opportunities in existing units shall be provided, when reviewed annually, in a manner consistent with these ratios. If annual review discloses a failure to adhere to these ratios, the ratios in the subsequent year shall be adjusted to restore the intended balance.

6. **Definition of Existing Affordable Housing Opportunity:** An existing affordable housing opportunity occurs under the following conditions: (a) the City has identified a unit in a structurally sound building (or, if self standing, a structurally sound building) which unit is itself in good move-in condition; (b) the location of the unit furthers the integrative purposes of the LTPO; (c) the building is in stable fiscal condition; (d) the purchase price, maintenance costs and other associated costs meet the criteria for affordability set forth in paragraph 5 hereof; and (e) an

LTPO qualified individual has purchased or rented the unit or the unit has been offered to six (6) bona fide LTPO qualified individuals who have theretofore placed their names on the waiting list for affordable housing and is suitable for such applicants in terms of unit size, cost and location, but has been declined by all six offerees. Where the city seeks a credit for any such unit it shall submit to the court documentation showing the nature of the unit offered and signed statements by each offeree explaining why s/he declined said unit. Should any plaintiff dispute the City's entitlement to a credit for any such unit it shall file any such objection within fifteen days of the City's submission and the Court shall thereafter determine any outstanding issues.

7. **Monitoring:** The HSM is hereby designated to monitor the City's implementation of the housing remedy orders. The parties shall attend periodic meetings called by the HSM to assess implementation of this Order. As Monitor, the HSM shall report findings and conclusions to the parties and the Court and make recommendations to the parties and/or the Court. The HSM shall not be responsible for implementation of any aspect of this order except as set forth in paragraphs 1 and 9 hereof.

8. **Creation of Affordable Housing Implementation Office:** By January 1, 1997, the City shall create a separate City department entitled "Affordable Housing Implementation Office" (AHIO) which it shall staff in the manner required to properly and timely meet the objectives set forth herein. The City shall meet the objectives set forth in paragraph 2, oversee the new construction set forth in paragraph 1, and provide housing counseling services to LTPO qualified

individuals. The Mayor shall be responsible for designating a Director for the AHIO. The Director shall report directly to the Mayor and shall attend meetings called by the Monitor. The City shall monthly prepare written updates of implementation activities which shall be made promptly available to the parties, the HSM and the Court.

9. **Role of FHIO:** The parties recognize that since 1986, the Fair Housing Implementation Office (FHIO) has served the Court, the parties and members of the Yonkers' community including LTPO qualified individuals. Effective January 15, 1997, FHIO shall be dissolved and administration of the Affordable Housing Trust Fund shall be transferred to the City, where it shall be maintained in a segregated fund for the sole purpose of implementation of this Order. Expenditures from this fund are subject to approval by the HSM for the sole purpose of assuring that such expenditures are for the implementation of this Order. Between the date of this Order and January 15, 1997, FHIO staff shall assist those designated by the City to staff the AHIO, by (a) making available relevant files, including lists of LTPO qualified individuals in need of said housing, (b) responding to questions concerning federal, state, county and private housing subsidy programs and (c) cooperating with the AHIO and its staff in any other manner consistent with the objectives of the housing remedy orders. On or before January 15, 1997, FHIO may submit a close-out report to the parties and the Court providing any recommendations it may have to forward the housing implementation process.

10. **Fair Housing Education and Counseling Services:** Starting within six months of the date of entry of this order,

the City shall provide on-going fair housing education and counseling services, for the term of this Order, including, but not limited to, the following:

a) A program to educate residents of the City about their rights and responsibilities under federal, state and local fair housing laws, through dissemination of printed materials, advertising and other methods of verbal and written communication;

b) a series of fair housing education seminars for persons in the housing rental, sales and lending businesses; and

c) an office with at least one fair housing counselor to respond to inquiries from the public about fair housing rights and responsibilities, to refer persons who wish to file complaints concerning suspected discrimination to, as appropriate, the Yonkers Commission on Human Rights, HUD, the New York Division of Human Rights and the United States Department of Justice, to inform complainants of other assistance available through private non-profit organizations, and to assist complainants in communicating with the appropriate agencies, including making available applicable complaint forms.

11. **Applications for Subsidies:** The parties are apprised that currently, both the state and federal government have funds available to assist cities in providing affordable housing. The Court has previously ordered the City to seek

such funding. The parties reiterate the City's commitment to aggressively seek such funding from third parties and to use such funding in implementation of this Order.

12. **Southwest Yonkers:** The parties agree that it is in their respective interests to insure that substantial efforts are made to upgrade the conditions of residents of Southwest Yonkers, including those currently residing in public and/or subsidized housing. The City, working with input from the NAACP, community representatives and elected officials from Southwest Yonkers, shall implement housing policies to address such objectives.

13. **Mutual Cooperation:** The parties recognize that this dispute has been divisive and bitter for the citizens of Yonkers. They pledge to work together with the Monitor and the Court to resolve issues which may arise during implementation in a cooperative and collaborative manner. They further pledge to engage, to the maximum extent possible, in problem-solving, keeping in mind the City's constitutional and statutory obligations and the plaintiffs' recognition that through municipal action, there lies the greatest chance of successful implementation.

14. **Reservation of Jurisdiction:** The Court reserves the right to modify this Order *sua sponte* or on request of any party at any time in the event that it shall be shown, after a hearing, that the goals set forth herein have not been realized and are not likely to be realized in the foreseeable future, absent such modification.

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The foregoing provisions have been negotiated and agreed to by the parties to implement remaining aspects of the Housing Remedy Order and LTPO.

SO ORDERED

Dated: New York, New York
November 6, 1996

s/ Leonard B. Sand
Leonard B. Sand
United States District Judge

APPENDIX 14 — THE CITY OF YONKERS AFFORDABLE HOUSING: YEAR ONE — ANNUAL REPORT "A FORMATIVE YEAR OF CHANGE, GROWTH AND PRODUCTIVITY" DATED FEBRUARY 24, 1998

[Omitted here but submitted separately as Lodging Appendix]

APPENDIX 15 — MEMORANDUM OF THE DEPARTMENT OF PLANNING AND DEVELOPMENT, CITY OF YONKERS DATED JANUARY 19, 1999 WITH YEAR 2 EXISTING HOUSING CHART

[Omitted here but submitted separately as Lodging Appendix]

APPENDIX 16 — TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 24, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

v.

YONKERS BRANCH, NAACP, et al.,

Plaintiff-Intervenors,

v.

CITY OF YONKERS, et al.,

Defendants.

New York, N.Y.
February 24, 1999
2:30 p.m.

Before:

HON. LEONARD B. SAND,

District Judge

* * *

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[3] (Case called)

THE COURT: We have a fairly long agenda. The common denominator is Yonkers and housing, and there are a variety of issues.

Mr. Sussman.

MR. SUSSMAN: Thank you, Judge.

As the Court has indicated, there are a variety of issues. And what I would like to do, Judge, if it pleases the Court, is to set forth what the NAACP sees as the critical issues regarding the housing at this stage, focusing primarily on the existing housing and not the new construction for today, although there are issues with regard to new construction.

THE COURT: I hope we reach some of those issues.

MR. SUSSMAN: I certainly will address those as well. We did meet with Ms. Melkonian earlier and all of the parties on what the issues are, and I don't think it would be a surprise to any party.

Let me start with what the NAACP considers to be the most fundamental problem, and there are really two of them, and while they are integrally and interrelated, they are also severable, I believe.

Obviously, and I don't have to tell you this, we are in a remedy stage, and we are in a remedy stage for particular violations, and those are race conscious [4] violations. As

the Court and Second Circuit and everyone who has looked at this found from *Milliken* on, there has been to be a remedial aspect, there must be a remedy of the violation and, that, I don't think is a surprise.

Here, the most immediate class of people and those I represent and whose rights were violated were defined by the Court in 1981 as individuals who resided in public and assisted housing for a period, I believe, that went back, for those purposes, to 1970.

Now, of course, we are almost 30 years hence. That group of people, your Honor, were defined for the purposes of the remedy as priority 1. That means people who had resided or then did reside in public or assisted housing in Yonkers.

And, clearly, a reading of the Court's remedial orders show that the desire and, I believe, the constitutionally-tailored desire of the Court and the parties was to address, in an integrated manner, housing opportunities for those individuals.

Now, there have come in the last two years two distinct problems. The first problem, and I pointed this out to the Court when it initially was considering it before we did implement the initial housing program as designed by the city, that there could very well be — and now it is clear there is — a mismatch between a program that is [5] highly homeowner oriented and the housing of priority 1 households. That is largely a financially driven problem.

Obviously, there are psychological problems. People have rented their entire lives and know rent housing — and this has been documented — and loathe home ownership. The new construction which has not been built yet at Yonkers Avenue was to be the larger new construction project, and the number has dwindled down over time from when Ms. Hill first proposed it to now.

The existing program to this date, according to the figures which I believe are without dispute, show that in 1998, seven priority 1 households — seven — have been afforded housing opportunities through the existing program.

Now, that is simply insufficient. The numbers of people in priority 1 are in the thousands. The number of people on the list that the city maintains is in the hundreds. And to say, as the city says in its letter, that there are no qualified priority 1 people whose needs have not been met through the existing housing program is simply, in my judgment, to indict the existing housing program because it is not tailored to meet their needs.

THE COURT: Let's stop there for a moment. It is a discrete group of people?

MR. SUSSMAN: Not exactly.

THE COURT: At least those who are presently in [6] public housing and those, I suppose, the records are available for.

What is the definition of the priority 1?

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MR. SUSSMAN: Persons in public and assisted housing. You remember there are two distinct types of subsidies housing is in. You have the MHA and the 236 type housing, and families occupy both of those and have occupied those, and the Court has dealt with all of those.

THE COURT: When you take issue with the statement that there are no eligible or no qualified priority 1 class members, is that based on any analysis or inquiry or survey?

MR. SUSSMAN: It is based on this. The numbers which the city has provided of priority 1 people whose applications they have show several hundreds. Those being served are the number which I cited. The difference is those who don't meet, for one or another reason or are unable to meet for credit purposes or for whatever purposes, the requisites of this program.

So when you say is there a number, there is a number which is the number, the gap between those who have expressed interest in housing and getting housing opportunities and those who can be served by this program. The city reports show that number repeatedly month to month.

THE COURT: What is it that should be done that [7] is not, in your opinion, being done to move persons from that list to the program?

MR. SUSSMAN: In my December 16 letter to Mr. Fitzpatrick which followed our meeting of December 1998, I suggested, as we had suggested previously, a way of dealing

with this which is that — and I had understood at that point that this would be considered by the city, although I have heard nothing from it since — some portion of the funds which are within the Affordable Housing Trust Fund ought to be allocated to persons to assist them in rent subsidy programs — in other words, home ownership is not these people's housing needs over time.

THE COURT: You would increase the assistance being given to persons in priority 1 so that a greater number would be eligible, would be qualified?

MR. SUSSMAN: Would qualify.

Let me go to the next issue which is related, and it is a different issue and it has some constitutional implications, as I perceive it.

The existing housing program, as it has been operated and, I think, again, this is demonstrable as we look at table 2 of Mr. Fitzpatrick's submission which came to you yesterday — at least I think that's when the parties received it. You will see, if you spend any time studying the column to the far right, that a large number — by large [8] number I mean at least a third — of the 1998 beneficiaries of the existing housing program are classified as "other" which, for the purposes of this case, is majority persons.

This is what has occurred with regard to housing assistance. We have what is called, in the vernacular, a finders keepers program. This deviates from the initial model that was discussed at least in 1996 between the mayor, myself

and others. The program which we understood was going to be implemented, and which the city in fact started to implement, was a program in which the city was going to acquire units and then make these units available to priority 1 people in some sort of an order. And that would assure the priority system would be effective. It was not simply a finders keepers program.

It is a different quality, and what we have in fact seen in the last two years is, anybody who claims eligibility under any priority — remember, priority 2 are people who live in Yonkers; priority 3 are people who work in Yonkers — any person can basically go out and say, I found a housing opportunity. I'm a priority person, and I want your assistance. Here is my income.

And recall that the income levels are rather significant. The median income is $80,000. An average Caucasian household in this program, now living in Yonkers, making them priority 2, go out and find a house in another [9] part of East Yonkers — they already live in East Yonkers — and go to this house. We need 25,000 subsidy dollars. They go to the office and make an application. For all practical purposes, there is no waiting list and they go in and get $25,000.

The NAACP views that as an abomination. That is not the way a program like this can work. It does not further any desegregative objective to have it work that way, the white family moving from one predominantly white neighborhood to another — and which is a middle income family, by all definitions. The program is not, at least as we understood the desegregative intent, benefiting from that.

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We have approximately, in 1998 alone, 30-plus households of that sort out of the number of credit seekers of — in other words, the city seeks credit. 30 to 35 have the characteristics I just mentioned and told the Court about, white households moving out of Southwest Yonkers, qualifying for funds from the program — powered by the program, moving to East Yonkers, and the city claims that is OK because it is outside of West Yonkers. It is not OK. It is basically, the NAACP contends, an improper implementation of the order. It does not foster the desegregation purposes of the order. It is not an integrative objective.

The city takes the position in the discussions we [10] have had in the last three months that this is a race neutral remedy. It cannot be race neutral. It does not make any constitutional sense. The purpose is to foster the elimination of racial segregation. We cannot do it with a race neutral program. It is like saying in employment discrimination that African-Americans have been deprived of equal opportunity, but the remedy ought to be race neutral for everyone. It cannot be. It has to be as sensitive as the discrimination was sensitive.

There is a limit to that principle in this case which is, I think, an important limit. And I think it can be called a longitudinal limit. Here, you know, the purpose was to foster integration through providing for minority households to make desegregative moves. Once they made those moves, there was no racial covenant associated with that unit. In other words, if they were living in Southwest Yonkers, that family, and they moved to Southeast Yonkers, they now have

a house there or an apartment there, there is an affordability covenant, but there is not a racial basis afforded or a racially-based covenant.

The reason for that is logical. The presumption, once the program takes hold and functions, Yonkers becomes more desegregated. The initial patterns of the market are broken and you don't need, over time, to perpetuate that race character.

[11] The point is, if you initially, however, allow the housing subsidies to go to white families or black families who are moving segregatively, you are not promoting integration and not promoting a remedy. That is the second central issue.

The numbers which we have on this issue come from 1998. We do not have numbers from 1997 for the 81.5 units of credit given. I have gone back over the 1997 documents which the city provided, and it is unclear. They don't have any racial characteristics associated with them directly. It is unclear how many white households participated, but it is fairly clear from looking at the names and drawing the reasonable inferences that a large number of whites participated. But I don't have a number, and I cannot tell the Court how many such units there were, but there were a considerable number, quite clearly.

There is guidance needed from the Court on whether, in implementing this remedy, there is to be a degree of race consciousness, as I have explained it. Now, white families might be able to participate in this remedy consistent with

the Court's finding in this matter if the Court found that, by dent of the segregative conduct that Yonkers and the state engaged in, Southwest Yonkers was made markedly more segregated — it is clear that in 7,000 units that occurred. White families who were interested in [12] participating in this program, who were interested in moving into subsidized housing opportunities from Southwest Yonkers could get credit because, definitively, those moves are integrative under those orders. So when we talk about a race-conscious remedy, that does not necessarily mean that whites could not participate. It does mean that, to have white-supported segregated moves is inappropriate, and the Court should not permit that. That is the second central issue that exists.

Now, the other issues that we are here to deal with today are more minor, the Yonkers Green project, with which I will close. I am going to let Ms. Houk, if you don't mind, explain the YCAP. It relates essentially, again, to the priority 1 issue. YCAP is another city agency. It is not the Yonkers Affordable Housing Agency which Mr. Arcaro and which Mr. Farmer previously headed.

In 1997 the city was given this credit for the housing opportunities made available through YCAP. However, we noted at the time that YCAP was not following any priority 1 system. In other words, the priority 1 families were not being afforded the housing opportunities which the second supplemental order contemplated.

We said that year, OK, we have done it. We have given you the credit, but from now on priority 1 families — and we know there are such families — must be given the [13] first opportunity, consistent with the order for the YCAP units.

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In November at our meeting, Mr. Delando, who was then with the office, was questioned about this and he stated that the YCAP units through 1998 have not been sent to tenants, so the priority 1 families were not given that opportunity and, for that reason, the plaintiffs objected to the credit for this year. It has not been operationalized in a manner consistent with the order of the Court and the agreement of the parties.

The only other matter at this point relates to Yonkers Green which is a significant issue in the context that I have sketched. As the Court knows, no new construction has been initiated to this date in Yonkers. And it may be closer, our groundbreaking at Cross Street, but it has not yet occurred.

The city promised June 8 of 1998 to, for example, have an LDA agreement on one of the sites with Ginsberg — that is the East Grassy Sprain site. Now, seven or eight months later, there is no LDA with the developer, the Vanderbilt Company, for that site. The pace of new construction has been dismal, quite frankly, and the stops and starts are of extreme frustration to the branch and class members —

THE COURT: As distinguished from who else [14] involved in this?

MR. SUSSMAN: Yes, you are correct.

— in this context, who supports and has since 1997 supported the construction of 124 units of what are effectively subsidized housing at $25,000 subsidy per unit for what is called the Yonkers Green project. And the

developer has submitted, with municipal support, an application to New York State for the $25,000 per unit, and the state has asked the Court for guidance on that.

Our position is that, under the initial injunctive orders which this Court entered, it is not permissible in this context — and I am referring to the 1986 order and from the May 20, 1998 — to intentionally promote racial segregation in Yonkers — it says that.

This site, Judge, is next to Whitney Young. It is in the site of Southwest Yonkers and it is predictable — as it was for all of the UDC projects — that this site would be tenanted overwhelming by African-Americans. In fact, the City of Yonkers is supporting the site — and Ms. Houk has the letter — in which Mr. Fitzpatrick, I think, in July 1997 took the position that it would seek to dedicate the units to those who are eligible.

This is going to be half rental and half home ownership. And what is going to happen is, the priority 1 people who otherwise have no housing opportunities under [15] that formulation will come into this development. We cannot stand for that. Whatever the effect may be in Southwest Yonkers — segregative effect — whatever the beneficial effect might be, we cannot stand for that because we believe it violates the injunction, particularly at a time when the city in fact is not going forward and doing things elsewhere in the city.

THE COURT: Yes, I understand —

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MR. SUSSMAN: Go ahead.

THE COURT: I understand the significance of what you are saying and what the problem is and the dissatisfaction with the accomplishments to date, but when you say the city isn't doing what, suppose you be specific as to what it is that you believe the city could be doing and is not doing.

MR. SUSSMAN: Let me go through the situation, your Honor. With regard to June 8, let me start with what happened on June 8. The city came to the Court on that occasion — and this was three months before School 15 opened. The court order from October of 1996 specifically states that School 15 is not to open until there is housing built in East Grassy Sprain. Three months before School 15 was to open and, in fact did open, the city took the position that one at Ginsberg — remember, on the East Grassy Sprain, in February 1998, RFPs went out. We are now [16] in June, four or five months later.

THE COURT: The bottom line is, what has the city not done?

MR. SUSSMAN: There is no LDA for that site with Vanderbilt. In that month, June, the city said — and I have the record, the trial transcript — Give us Ginsberg and by July 15, 1998, we will have an LDA.

The Court had a reservation about Ginsberg, set up a process, and the city informed the Court through letter that Ginsberg had dropped out. We are at February 22. The city makes a submission before the hearing. This is a draft LDA which is not signed by either party —

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THE COURT: Are you suggesting that there's been a deliberate intentional foot-dragging on the part of the city?

MR. SUSSMAN: Absolutely. I am suggesting, if people wanted to sit in a room and wanted to get an LDA and there was a court order to expeditiously move this ahead with the goal to finish, the parties would not leave the room without an LDA or the city gets somebody else. The project has to be a priority. There is no evidence that it is.

With regard to Yonkers Avenue, we have a situation, as you are aware, where we were squabbling for months about the funding, how was the AFL-CIO going to play [17] a role. It is my understanding that there are still issues outstanding as to the developer, the AFL-CIO and the city. There is no closure.

There is no firm set of deadlines with regard to the Hoover Road site. Judge, as you probably recall, the developer on that site was eventually thrown out. That was Shapiro. Another developer came into the picture. At this point, there is a document of several pages. It is totally inconsequential in content. It says essentially nothing, representing the memorandum of agreement between the parties. Nothing is happening of substance. There is no priority being given to making these things happen. We are two and a half years or two years and four months beyond when the city got control. They continue to blame the prior administration, Ms. Melkonian, whatever is said publicly — it is improper. It needs to be a priority.

The reason, with regard to Yonkers Green and why it is relevant, Yonkers Green, 124 units of subsidized housing in

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Southwest Yonkers, even if all of the construction were performed, new construction, in this court order, there would be about 66 units of subsidies — 66 units. Remember, the number is half of the total number of units because these are mixed income developments. So how can one begin to allow that to go forward in this context? It is just imbalanced.

[18] THE COURT: Let's come back from the frustration of new construction, which we all feel. You specifically assigned the responsibility for that to the city, and you accuse the city of deliberate foot-dragging. We will hear further on that issue.

But coming back to existing, with respect to the priority 1, you do make a specific suggestion, which is that there be a reallocation of funds so that there is an increased financial assistance given to those who are in priority 1.

MR. SUSSMAN: Rental-related housing as opposed to simply existing home ownership opportunities. The data already exists that, for most of those people, a large number, it is not a viable option. That is the problem.

THE COURT: With respect to the other priority 1, one of the things that I wonder about is whether the concern to generate the numbers has caused there to be a loss of focus. Obviously, with respect to persons in priority 2 and priority 3 and persons in some of the examples you cited, those are fairly easy and quick.

MR. SUSSMAN: I agree with you.

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THE COURT: And if that is part of the problem, maybe there should be a weighting of the moves. In other words, maybe where it is a priority 1, there should be more than a one-unit credit; and where there is a priority 2 or [19] priority 3, there should be less of a credit so that, to the extent to which numbers are motivating what happens here, the system of accounting will motivate greater emphasis on moves which fall within the category of integrated moves.

MR. SUSSMAN: One issue that I think the Court has to be cognizant of when it starts differentially weighing is this. We have financial constraints with this program. I'm sure Ms. Melkonian has briefed you on some of those and how they, in June, July, were of some significant moment to the program's very existence, in a way.

I think that the Court has to look at this through the prism of scarce resources. Even though we now have the state involved and have even scarce resources, the resources ought to be facilitated to integrational moves, and that should be the message that Yonkers gets. And for whatever the reason, I don't think that that is the message abroad regarding that, and the numbers tell that story.

I also believe, your Honor, that whatever weight you assign the priority 1 household, if the program is not structurally expanded — and I use the word "expanded" — so that there is more focus on rental opportunity, you are not going to reach the plethora of those households who need housing opportunity.

A lot of this has been experimental, and all of the parties acknowledge acknowledged it. In the beginning, [20] we

didn't know how the existing was going to work. You gave the city a year at one point to see how it was going to work. Nothing was done. OK, you make a commitment to the existing. But what the data is showing is that this existing has been very fundamental, systematic — they are different. I said they are interrelated, but they are distinct. Priority 1, which is primarily a financial matter and attitudinal factors that certainly play a role in why some of these families are unable or disinclined to get affordable ownership housing —

THE COURT: When you say "unable" or "disinclined," those are two very different things.

MR. SUSSMAN: I agree.

THE COURT: I don't know whether one can quantify the extent to which this is a question of being disabled or disinclined. The purpose of the remedy is to create housing opportunities and, if the opportunity is made available to someone who is in priority 1 but there is a disinclination on the part of that person or family to avail themselves of the opportunity, it seems to me, the obligation of the city and of the Court is disjarred —

MR. SUSSMAN: You have said that on other occasions.

THE COURT: Yes, I have.

MR. SUSSMAN: But I think the problem with that [21] analysis — and, again, it goes back to the tailoring factor. The violation here was in the construction of not one housing ownership opportunity; it was in the construction and

concentration of rental housing. That is where these people are concentrated. They were not concentrated in home owner opportunities. And the class of people is obviously related — and "class" means their economic class. It was a rental housing group that was so concentrated.

We have all talked about home ownership and everybody agrees, but to say, If you are not inclined to take a home ownership option, after you have been constrained as a renter all your entire life — and that's all the city has to do — I think that is too narrow. I think the nature of this violation should play some role in providing rental opportunities for those who have been so tenured their entire lives.

I think the Court on other times expressed the same view that you expressed a moment ago and said, Yes, rental housing should play a role. We were talking about the relative mix. Yonkers Avenue is a rental project — not that the city wanted any new project to be rental, but the Court understood that there had to be some proportionate mix.

All I am saying, in the existing program, that [22] has to be mirrored and is not being mirrored. The lack of mirroring is having a deleterious effect on the priority 1 families, and those are the families who ought to be the most targeted for this Court's remedy and consideration, not just anybody who live in Yonkers, anybody who works in Yonkers, whatever their race is. They should be, frankly, of no constitutional moment to the Court. The Court has no business in worrying about whether the white middle class person in East Yonkers has access to a housing subsidy.

THE COURT: It is of total indifference?

MR. SUSSMAN: The Court's attention should be on those minority families who are largely priority 1 people who have been concentrated and who are not in fact reaping the benefits of this remedy. That is the issue.

THE COURT: There was a time when efforts were being made to hold meetings to attempt to encourage people who would be in priority 1 to avail themselves of the opportunities available under the remedy order. Have those efforts stopped?

MR. SUSSMAN: Mr. Fitzpatrick, page 3 of his February 22 letter talks about outreach efforts and, as the Court will note, he references efforts in November, December 1998, which I must say occurred at the point we were raising these concerns about the dearth of opportunities provided priority 1 people.

[23] But I want to emphasize one point that may be getting lost here. There were lists of priority 1 households that the city has — priority 1 households who are deemed, as I said, very early in this conference, not able to qualify, through credit histories and other issues for existing home ownership opportunities.

So it is not a question of: Is there outreach? Do we know that there are people interested? There are people interested. It is a question of the match between those people and home ownership.

I think I have basically said what I can tell the Court on these issues, and I know that there are others, so thank you.

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THE COURT: Ms. Houk.

MS. HOUK: Just to pick up on the issue that you and Mr. Sussman were discussing, I think that we do have some information which helps to inform us on the question of unable versus disinclined.

For example, in 1994, FHIO prepared a report which was really a demographic of the 1,400 families that had indicated, at some point in time, interest. And we know that, out of those 1400 families, 36 percent, or 532, were priority 1.

So the question now becomes, five years later, what has happened to those 532 households when only 23 [24] households in '97 were provided with a housing opportunity and seven households in 1998.

We know, looking at this report that, out of those priority 1 applicants, 57 percent of them were below 50 percent of the median income. And once we get to 50 percent below the median income, we understand in the work that we have done in the last few years that it becomes more difficult and, at a certain point, even impossible to provide them with a home ownership opportunity. As of 1994 more than half of the priority 1 applicants were really not in a position to afford and take advantage of a home ownership opportunity.

The question then becomes: What is the profile now? We know that the profile is very similar because, in November and December of this past year, I asked the city in its outreach on the Cross Street project to specifically send a letter to every priority 1 person on the current list and

everybody currently living in public housing and assisted housing that is at 30 percent or higher of the median income because those would be the households that would be mostly the households to apply for Cross Street.

With just one letter, 183 families responded. According to the documents contained in the report that the city provided for you, nearly one-half of those families, again, fall in the very low income categories and, as a [25] practical matter, probably will not be able to avail themselves of the Cross Street opportunity.

So the question of being unable to and whether a home ownership program really provides a remedy to priority 1 is a true question, and I think we have enough information now to know that it is not providing a remedy for them and that some kind of rental opportunity needs to be incorporated.

But you also asked a second question, and I think, from the United States' perspective, we have two things to propose on the second question, which is the question of being disinclined.

The question of disinclined is often a chicken-and-egg question. If you have been raised in a community in which your family has historically been segregated and your understanding is that you may not be wanted in other neighborhoods, you may not be able to afford opportunities in other neighborhoods, that there may not be amenities and benefits that are open to you and that will welcome you, it is very difficult to respond affirmatively or decide to make some move without some outreach and counseling being done.

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And the outreach and counseling components of programs throughout the country include two parts. The outreach part is, in essence, a marketing campaign to put [26] together information about the other areas of Yonkers outside of Southeast Yonkers, about what those neighborhoods have to offer, what the housing stock is, the amenities and benefits and why it is that people want to live in those neighborhoods, what is great about those neighborhoods.

The city of Palmer, in a long-standing lawsuit, has opened a housing counseling office for two years, has instituted an affirmative marketing campaign to attract minorities to come and live in Palmer through the use of community profiles and videotapes to promote the city, bus cards running through minority neighborhoods and other forms of public relations and marketing that we have available to us today. And I think that the City of Yonkers could incorporate such an outreach plan into its program which would help the second piece.

The other part of the disinclination has to do with counseling. Right now, the City of Yonkers' existing housing program, as Mr. Sussman said, is finders keepers. It is up to the buyer to go out and find the house and buy it, to get the subsidy to it.

In a market in which we cannot say to buyers, There is no more discrimination — even the Department of Justice, private organizations continue to file discrimination cases through this county. We know that the market is not free of discrimination.

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[27] There needs to be some addition to the City's current counseling program that will assist people in informing them about particular opportunities and assuring them that those opportunities are open to them.

I have discussed with the city and the city has begun exploring the use of something called a bio-broker, and we would like to see and had asked a couple of months ago for some kind of written plan from the city that will address the rental piece of this, how are they going to provide opportunities for priority 1 families that are financially unable to become home owners and those who are financially estopped for other reasons, what kinds of outreach and counseling programs are they going to provide to them to assist them in making the moves. It may include providing neighborhood tours.

There is a group down in Miami, Florida that is working with HUD housing residents that are relocating as part of a settlement of a long-standing fair housing case involving the Housing Authority, and they have some vans and you can take a tour of Boca Raton, to Sunrise, to all kinds of different neighborhoods that, as a minority public housing resident, you just assumed were off limits.

Now the Court has suddenly said they are open to you, but you are going to need someone to say to you, yes, that means something that is concrete. We will assist you [28] in locating that housing. We will assist you in informing you about the neighborhood and what is available, and we will assist you in getting access to that community above and beyond the issue of the financial support.

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I think the city has gotten the message out that the financial support is there for people. These are the add-on-pieces that need to happen to really serve the priority 1 families.

I want to mention a couple of other things so that Mr. Fitzpatrick can speak.

The two other things have to do with just clarifying a little bit more on the YCAP issue for the credits. It is going back to some of what may be viewed as the more mundane issues of the credit, and it becomes very important as to how the city plans its programs for the next years.

Mr. Sussman explained correctly the plaintiffs' objection to YCAP. And our concern continues that, particularly in light of the few number of priority 1 families that are being helped, the more that the city may rely on YCAP and other city programs which do not use the priority system, it will only further reduce the numbers.

In year 1, there were 23 priority 1s. In year 2, we are down to 7. Is it going to be none next year? And that is a fear that we have if the city does not come up [29] with a written plan with a component which Mr. Sussman and I have talked about today.

Finally, I want to speak briefly about Yonkers Green. The concern that the United States has about Yonkers Green has to do with the manner in which it has been proposed to the state.

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Specifically, the correspondence that Mr. Fitzpatrick provided to the state indicates that these units would be designated to LTPO qualified applicants. Right now that means priority 1 gets a first shot at those units.

We know from the moves that have been made, that 86 percent of the people that are in this program are black or Hispanic. I think that tells us, in a fairly good way, that the families that will be purchasing or renting if a priority is given under the LTPO are going to be a minority household, and that will not further residential integration in Yonkers.

We think that there may be a way for there to be home ownership development in Southwest Yonkers. That is certainly a good thing. These units would be for families that are 80 percent median income. The Court orders recognize a provision for half credits for families from 50 percent to 100 percent of median income, so that some of the people who buy at Yonkers Green may well fall within what was anticipated. However, unless there is an affirmative [30] marketing plan to reach out to non-minority families to purchase and rent the units, unless there is no requirement or offering through the LTPO system — meaning priority 1 families are not given a priority for these — and unless the state in the initial grant that is made of money for the first 40 units makes it clear that, while they may be funding these first 40, the city cannot rely on funding necessarily in the future and there will have to be re-applications because the state will have to consider the issue of confining subsidized units on Southwest.

The state has informed us that four more applications are pending with the other parts for Southwest. One is for

senior development. Three are not. Three would be family housing. Those add up to more units. When you add Yonkers Green in, then we will be constructing outside of Southwest Yonkers. And the state ought to be making it clear to the city that, each year they receive applications on Yonkers Green, they are going to have that in the totality of all of the applications they receive, and if there becomes a concern — 40 units may not raise the concern of confining subsidized housing, but I think that at a certain point there is going to be that concern, and we have to be aware of that.

So the things the state could notify the city of, if they are going to go ahead with this funding, they will [31] consider each subsequent phase separately and in the context of any other funding for Southwest Yonkers; secondly, that there must be an aggressive affirmative marketing campaign to open up this phase and opening it. In other words, these units, first priority would be given to priority 1. We know that the prior years have been 86 black and Hispanic in the last two years.

THE COURT: Thank you, Ms. Houk.

Mr. Fitzpatrick.

MR. FITZPATRICK: May it please the Court, your Honor, there are a number of different issues that have been addressed here today, and if the Court wants to guide me towards those that it is most concerned about, that is perfectly acceptable with me.

But I will start out, if I may, with the existing housing credit issues. The confirmation of credit is important to the

city because there is a reimbursement formula that has been negotiated with the state as a part of its order. At some point in the very near future, we would like to have confirmation that the city has completed for year 2 the 87 credits, as outlined under tab 2 of the report that I submitted to the Court. Those units were facilitated by the city during the period from February 18, 1998 through the end of 1998.

And I will have to say, your Honor, the goals of [32] the order are very aggressive. There is pressure on the city to achieve goals on an annual basis, and it probably does have some programmatic impact. I think we would be less than honest if we didn't say so.

Frankly, it may be surprising to some of the parties, but I am often involved in very spirited debates with the office about whether particular moves meet the strict criteria of the Court orders and what the Court orders permit and don't permit, and I'm often not well thought of by some staff members because the staff has tremendous pressure on it to achieve goals, and yet we are trying as carefully as we can to meet the letter and spirit of this Court's orders.

With regard to the underlying purpose of the orders, which is to remedy racial segregation through facilitation of economically integrative housing opportunities outside of Southwest Yonkers, I think the chart, the map on the easel which dots every unit for the past two years — the yellow are the first year, the green the second year — your Honor can see, and I hope your vision is better than mine since I couldn't see it very well —

THE COURT: I can see it.

MR. FITZPATRICK: — you can see the lines for Southwest Yonkers and what I consider pretty good [33] distribution throughout the target areas.

THE COURT: Mr. Sussman cites instances in which black families move from Southwest Yonkers to Runyon Heights under the program and a white middle class family moved from out of Southwest Yonkers into an all-white neighborhood, and it raises the question of how those moves could be within the spirit of the remedy order.

MR. FITZPATRICK: Your Honor, there are always going to be anomalies in the process because we have individuals making individual decisions. Under the Court orders as constructed by the Court painstakingly over the years, there are certain requirements, and nothing in the order provides that we are either to give preference to people on the basis of race or exclude people on the basis of race.

We have seven defined areas. We have a target area of outside Southwest Yonkers that is defined in the order as north of Glenwood and east of the Sawmill River Parkway. We get into debates, Well, how far north of Glenwood? There is no rule that says how far north of Glenwood. There is no rule that says that parts of East Yonkers were off limits.

There were two units last year where families chose homes in the Runyon Heights section of East Yonkers. And there were many other families that chose places outside [34] of Runyon Heights, but under the language of the orders, we

don't have the right to tell people: A) that they can't participate in the program because they are white or, B) that they can't have a home in a particular area outside Southwest Yonkers because it is prohibited by the orders.

The orders do say that we are to use locations that facilitate the integrative effect of the orders, but the integrative purposes of the order is to target areas outside of Southwest Yonkers.

THE COURT: But a move to Runyon Heights, how could that come within the spectrum of integrative purposes?

MR. FITZPATRICK: It does create an affordable unit in Runyon Heights.

THE COURT: Maybe it would be helpful for me to say this. I don't think there is much purpose in debating what has occurred. Hindsight makes us all wise and, perhaps if we were drafting the plan now, we would have the benefit of the experience and we would draft it differently, although there is no way that one would want to or could possibly cover every possible combination of permutations of the facts.

But it seems to me that the question now is, rather, whether we have had enough history so that we should, if I may use a cliche, "go back to the drawing board" and come up with a new order which reflects the [35] experience we have had to date.

I have suggested that perhaps it was a mistake or perhaps it is a mistake — let me speak prospectively — to concentrate

so much on numbers that the pressure for numbers may have lost the focus of the integrative intent of the move. And maybe what is needed is a system in which there is a greater incentive to concentrate on priority 1 and to more carefully define what is meant by furthering the integrative purposes of the order.

That might not be so difficult to do, but you have thrown in another element here, and that is, the agreement with the state for reimbursement, a changing of the method of evaluating the achievements of the existing housing program. Is that going to create reimbursement problems?

MR. FITZPATRICK: It probably would, your Honor, although there are caps on the reimbursement. And I'm sure that the state would be willing to work within those caps.

MR. SUSSMAN: Judge, the state is here, but I have never heard it stated by the state representatives that they consider the moves which we have been debating here integrative, forwarding the purposes of the order. I don't think that the state has any objection to the Court more clearly tailoring, as you are suggesting, the order.

THE COURT: Obviously, a more careful tailoring [36] of the order is probably, at least in the short run, going to result in a diminution of the numbers. And that may have an economic impact.

You have to look at this existing housing with some kind of a perspective. As Mr. Sussman has reminded us, there was a year in which the city was given an opportunity to come up with existing housing units and produced none.

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And then there was the plan and the different city administrations held out great optimism with respect to utilization of existing, and that led to the present plan which has produced, arguably, inadequate numbers but has certainly produced significant numbers of persons who, one hopes and assumes, have had their housing conditions considerably improved by virtue of the order.

Now maybe we are at phase 3. Maybe now we are at the point where we have to, as I said, go back to the drawing board and say we have to more clearly focus on those who are intended to be the prime beneficiaries of this order and move on with the plan.

It seems to me that is not an easy thing to do. It is certainly not something that the Court can do from the bench this afternoon because there are two factors involved there. One is the suggestion of a reallocation of funds to benefit priority 1 class members, and I am not sure where those funds come from and I am not sure what impact that has [37] on subsidy programs. That is something with respect to which the Court certainly will need considerable input from Ms. Melkonian as well as the parties.

And the other suggestion — and they are related — is that what is needed is a rental component to the existing housing.

I take it now, the existing housing is used solely for home ownership?

MR. FITZPATRICK: That is not entirely accurate, your Honor.

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THE COURT: Tell me the extent to which it is not accurate.

MR. FITZPATRICK: It is mostly accurate, if I may. In the course of the existing housing program, there have been a number of two- and three-family homes — mostly two-family homes — that have been purchased by affordable housing applicants, and those units come with a separate unit which is qualified as a rental unit, and there are nine units listed as pending credit on the tab 2 report.

Those units have not been occupied by families that we have verified are LTPO qualified families, and so we have a limited number — and I certainly don't want to call it anything more than a limited number — of units being produced by the existing housing program in that fashion.

There are other ways that rental opportunities [38] are being created. For example, the city has a rehabilitation program that other city agencies are facilitating which take in — one case, I know of a building with 10 units that has been substantially rehabilitated by another agency of the city.

The problem is, it doesn't open up new housing units for new families to move into. It typically involves, in placement, rehabilitation of the units for families who probably qualify as in need of assistance but doesn't create new moving opportunities. There are some things that are being done, but I am certainly not going to overstate —

THE COURT: I know that there is a school of thought which places overwhelming emphasis on home ownership,

for good reasons, and the theory that persons who have ownership rights have a different attitude and sense of responsibility with respect to the housing and so on. And there certainly has been significant recognition given to the desirability of home ownership in the plan to date and, I assume, in the plan as it may be revised.

But there seems to be a statistical demonstration of the fact that priority 1 class members are not benefiting to the extent one would hope under the existing plan, and that one way of making the remedy more meaningful to priority 1 class members would be to increase a rental component.

[39] MR. FITZPATRICK: Your Honor, with respect to priority 1, in consultation with Ms. Houk, we do conduct an outreach to priority 1 in coordination with the beginning of the marketing of the Cross Street units. The thinking was that, telling the potential applicants that Cross Street is soon coming on the market would encourage more people to come in and apply. And the letters that were sent to the potential priority 1 applicants said that Cross Street opportunities are coming up, and there are existing housing opportunities currently available.

I think that outreach was very successful. If you look at the list that was generated by the Affordable Housing Department a couple of weeks ago showing all of the people who responded to the outreach — both old applicants and new applicants — you can see a very substantial response.

The extent to which that demonstrates that they are also interested in rental housing is questionable because we don't

know that they are interested in rental housing or not. I'm sure some of them are. And we don't in any way reject the notion that people are not interested in rental housing, but there is certainly a need to address the interests of these applicants that are responding to the outreach, and the city is doing that.

In fact, in recent weeks I think projection in [40] the office of the number of closings has dropped because we have been focusing on working with both old and new priority 1 applications and giving that the highest level of priority in the office. And we will continue to do that and recognize the obligation to meet the needs of priority 1 applicants.

THE COURT: Anything else you want to tell me with respect to this?

MR. FITZPATRICK: Just a few quick comments, if I may.

With regard to the outreach and the counselling programs, there is already a component of the '96 order addressing that which was drafted by the United States, and there is a counseling and outreach program in place. It is a part of the monthly reports. It is included in tab 1.

We are continuing to work on that, and we are more than open to many of the suggestions that were made here today and interested in these types of suggestions, and I think Ms. Houk knows that we are.

There was another matter that Ms. Houk addressed on Yonkers Green.

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THE COURT: Let me just say one other thing, and we will take a break because we have been at a while and I'm sure that the reporter would like a break.

I am going to direct that, under the aegis of [41] Ms. Melkonian, that there be consideration given, ultimately culminating, one would hope, on consent, with the submission to the Court of a proposed revision of the remedy order designed to increase the ability of priority 1 class members to have greater housing opportunity.

I think that plan, obviously, has to give consideration to all of the things that we have talked about, including subsidy programs in the state and otherwise, outreach programs and so on.

I am not going to set a specific timetable for that, but I believe that it is a matter which should be given the highest priority.

Let's take a five-minute recess.

(Recess)

THE COURT: Mr. Fitzpatrick.

MR. FITZPATRICK: Your Honor, consistent with the Court's comments before the break, I don't see a need to address anything further on existing housing. With respect to the new construction, I have submitted a report.

THE COURT: I would like to turn to that in a moment.

Let me just say that, it seems to me that the YCAP issue is something which can better be dealt with in terms of this overall review that we discussed just before the break.

[42] And with respect to Yonkers Green, I am also going to defer on that. I would be less than candid if I didn't say that there has to be a motivation on the part of all participants in the efforts to revise the plan to reach consensus, and so I am not going to single out any of those issues because I think they are all part of the question of how well is the plan succeeding and how can it be improved.

With respect to the Court approval for the 87 credits which you say is relevant to reimbursement, does that also turn on the question of the YCAP issue and the other matters?

MR. FITZPATRICK: Yes, your Honor.

THE COURT: Then maybe, Ms. Melkonian, you will give that a high priority.

I understand that there have been some developments since the last very discouraging report that I received with respect to new construction. What is happening with Cross Streets?

MR. FITZPATRICK: Your Honor, last week I obtained confirmation from the developer's counsel that all nine market-rate units have been pre-sold with contracts and deposits in their trust account. I received a letter from counsel for the developer confirming that, which is included I think in tab 4 of the report.

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THE COURT: And therefore?

[43] MR. FITZPATRICK: Therefore, as counsel states, the precondition of the construction loan commitment has been met and they are ready to move to closing.

We received today a copy of the letter from the Bank of New York, which I gave to Ms. Melkonian and which I think your Honor received, which further confirmed that the precondition of the construction loan has been met and so that they are ready to move to close.

There are no remaining issues to a closing, other than a couple of extremely minor items relating to the building permit which, if you turn to the second page of tab 4, we advised the developer again last week, If you do these three things, you get your building permit. And they are very simple requirements.

THE COURT: At what point on the calendar will I be able to go up to Yonkers and see the groundbreaking?

MR. FITZPATRICK: Your Honor, it is within the sole control — I should not say "sole control" because I think you have the ultimate control here — that is a matter within the initial control of the Bank of New York and the developer. And we have told them that we are ready to close.

If they call me up tomorrow, I will show up with a deed. I will have to get Mayor Spencer's signature on that, but it does not require any other councilmanic [44] actions. I will show up any time any place with a deed to the property so

that we can move forward with a groundbreaking. All of the title issues are done. The building permits are certainly done. The architecture is virtually done.

THE COURT: The closing will take place prior to April 1?

MR. FITZPATRICK: I would certainly hope so. You don't have the developer and the Bank of New York under your jurisdiction, but if you want to issue an order to them, be my guest.

THE COURT: I don't want to issue orders for the sake of issuing orders.

MR. FITZPATRICK: Your Honor, I have made predictions in the past about what we are going to do and none of my predictions have come through, so I am not going to say that they will do it by April 1.

THE COURT: I will direct that, if for any reason the closing will not take place prior to April 1, that I be advised of that event, advised of the cause of that event and, if need be, I will take whatever action is appropriate.

MR. FITZPATRICK: The city concurs in that approach. I think I can perhaps claim a point of personal privilege, that the claim has been made that, with respect to the new construction, that there has been direct [45] foot-dragging by the city. There is no evidence with respect to that.

THE COURT: What is the story with respect to the LDA and Vanderbilt?

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MR. FITZPATRICK: I don't have all of the different drafts with me today, but I would say that, over the past four or five months, I have been exchanging drafts of the LDA with three different counsel for Vanderbilt Construction, and it seems the third one is a charm and is ready to move to a concluded deal.

The document which I included in the report virtually completes — the cover letter shows there is some issue about the numbers. They moved the numbers around in the last draft in order to basically take the increase in state subsidies that we negotiated in the state settlement and put that in the pocket, and that wasn't the purpose of negotiating the state subsidies. The purpose was to have the state contribute a meaningful amount to the amount of subsidies required for the project. That is a minor issue, your Honor.

We have a land disposition agreement virtually ready to go. We have a good relationship with the developer and, in my view, there is no reason why this LDA shouldn't be done April 1. That is a reasonable date, in my view.

THE COURT: And Yonkers Avenue?

[46] MR. FITZPATRICK: Yonkers Avenue, if your Honor recalls, there was a significant amount of activity on Yonkers Avenue back in September surrounding the AFL issue. We are still waiting for the agreement between HUD and the AFL which completes that subsidy arrangement. There was a lot of activity regarding —

THE COURT: Who at HUD?

MR. FITZPATRICK: I don't remember the names offhand or the particular —

THE COURT: That is delaying everything or what?

MR. FITZPATRICK: That is not delaying everything, but that is a major, major delaying point.

Second, the Yonkers Avenue project suffered a setback when the construction partner passed away very suddenly last October. Mr. Seavey has obtained a new partner.

We have had two meetings with the new partner. Frankly, it is fair to say that the new partner is reviewing the numbers in an effort on his part to improve the numbers. In any event, there has been some lag time in the new partner getting up to speed. We think that he should be up to speed now. Again, I have a draft LDA ready for Mr. Seavey. He has been very cooperative.

The city is moving forward, notwithstanding all of these matters with its obligations to clear the site, do [47] the asbestos removal, the tank removal. And we have an agreement with the Court and with HUD to have that underway prior to April 1, and we intend to meet that schedule.

We have bids in hand from a contractor to have the site ready for the construction of the building, and we will have that work underway on or before April 1, at least that is the agreement that we reached with your Honor last September.

THE COURT: Anything else anybody wants to say or that you want to say?

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MR. FITZPATRICK: Ms. Melkonian has reminded me about the Hoover Road project. The Hoover Road developer was confirmed on October 2nd. The developer, during the final quarter of '98, prepared its application to the state, submitted it in a timely fashion.

We are impanelling engineering and zoning issues with them, and the next step is to put together an LDA document with them as well. The new Hoover Road builder is cooperative, and we don't see any impediments to that moving at a fairly rapid pace.

THE COURT: All of these projects should be under construction this summer?

MR. FITZPATRICK: I cannot make that representation to your Honor.

THE COURT: Anything else that you want to say?

[48] MR. FITZPATRICK: No, your Honor.

THE COURT: Mr. Jacoby, anything?

MR. JACOBY: Only this, your Honor. We have listened to what you have said very carefully. We will work very closely with Marilyn and the group.

I just want to make one thing clear. In terms of the Yonkers Green project, there is not yet at this point a contract for that Affordable Housing Corporation money. And I have been advised that that will be kept open for as long as it reasonably takes to resolve that matter.

If there are future applications on Yonkers Green, we will deal with them when they come along, but we certainly will be taking into account what is going on here and how the original, the first phase application is dealt with. So I think all of those matters, as your Honor suggested, which relate to us, we will work on.

The other thing that I would just mention is, in terms of the state agreement, this settlement that there was some flexibility built into it in anticipation that some things might get changed. As we go through the process, participating in the revision discussions, we will raise any matters that might require some minor change in the text, but at this point it does not seem that that is going to present a significant obstacle.

We appreciate your time.

[49] THE COURT: Thank you.

Anyone else wish to be heard?

MR. FITZPATRICK: Your Honor, I have two housekeeping matters.

The first one is to alert the Court, in the next few days, the city will file a notice of removal of an action filed by Timothy Donohoe, a former owner of a portion of the Yonkers Avenue site who has filed a lawsuit in state court naming as a concern, Karen Hill, the Fair Housing Implementation Office and the City of Yonkers.

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The city received the suit a few days ago, and we will be filing papers to try to bring that to this Court. And that's all that I have to say about that. We don't know where Ms. Hill is, nor do we know that she has been served.

THE COURT: Her whereabouts are not a great mystery. Isn't she at HUD?

MS. MELKONIAN: Fannie Mae.

MR. FITZPATRICK: I don't know.

The city has been in study with Ginsberg Development Corporation about the development of a site that it has on Ashburton Avenue.

THE COURT: I have that letter in front of me, and I see that you have sent copies of it to Ms. Melkonian and the others. I would like to have some input from them [50] before I respond, but I understand that it is a matter of some time concerns.

MR. FITZPATRICK: Thank you, sir.

THE COURT: Anything else? I will see at least some of you tomorrow. Thank you for your patience and cooperation.

* * * *

APPENDIX 17 — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 14, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

YONKERS BRANCH — NAACP, et al.,

Plaintiffs-Intervenors,

– v. –

YONKERS BOARD OF EDUCATION, et al.,

Defendants.

ORDER

WHEREAS, at a court hearing held on February 24, 1999, the Court directed that the parties meet and consider proposed modifications of the court's prior housing remedy orders designed to clarify and improve those orders and increase their effectiveness; and

WHEREAS, the Court was advised that as a result of circumstances beyond anyone's control there had been delays in the implementation of this direction; and

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WHEREAS, questions have arisen concerning whether particular transactions were consistent with the letter and spirit of this Court's prior orders and there appears a need to adopt as an interim stop-gap measure procedures to enable a prompt evaluation of proposed transactions; now therefore, it is

ORDERED that the City shall submit to a designated representative of the Department of Justice (who, unless and until the Department of Justice shall designate another individual, shall be Diane Houk) data relating to such proposed transactions that will be of such nature as to enable an evaluation of whether the transaction is consistent with the Court's prior orders and entails an appropriate expenditure of federal funds, and it is further

ORDERED that no such transaction shall be consummated without the prior written approval of the Department of Justice but that if no objection is raised within five (5) business days after submission of the relevant data, such approval shall be presumed.

SO ORDERED.

Dated: New York, New York
April 14, 1999

s/ Leonard B. Sand
U.S.D.J.

APPENDIX 18 — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AWARDING CITY 43 CREDITS FOR YEAR TWO DATED JUNE 1, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

–

YONKERS BRANCH — NAACP, et al.,

Plaintiffs-Intervenors,

– v. –

YONKERS BOARD OF EDUCATION, et al.,

Defendants.

ORDER

WHEREAS, on November 6, 1996, the Court entered the Second Supplemental Long Term Plan Order ("SSLTPO") to further implement the 1986 Housing Remedy Order ("HRO"), the 1988 First Remedial Consent Decree in Equity ("1988 Consent Decree"), the 1988 Long Term Plan Order ("LTPO") and the Supplemental Long Term Plan Order Adopting Additional Remedial Measures ("SLTPO");

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WHEREAS, in order to further the implementation of the remedy orders in this case and to provide a manner in which the ongoing transactions could be evaluated, the Court entered into a further modification of the SSLTPO on April 14, 1999 ("April 14, 1999 Interim Order"); and

WHEREAS, following the April 14, 1999 Interim Order, several recommendations were developed that could address issues related to the implementation of the existing housing program; now therefore, it is

ORDERED that the City is hereby awarded 43 credits for Year 2 as identified by the parties in conferences held with the Court's Special Housing Master. The Court acknowledges that an additional 42 credits are in dispute for Year 2 (the "Disputed Credits"). The Court hereby directs that, within twenty-one (21) days from the date of this order (the "Distribution Date") the parties submit to the Court an explanation of why the Disputed Credits should or should not receive credit; and it is further

ORDERED that by the Distribution Date the City develop and circulate to all the parties and the Court a proposal to increase substantially the number of Priority 1 families served by the existing housing program ("Priority 1 Outreach Efforts). The proposal for Priority 1 Outreach Efforts must describe how outreach to Priority 1 families would be increased and follow-up conducted. Within twenty-one (21) days of the Distribution Date (the "Response Date"), the Plaintiffs shall provide written comments, if any, to the City and the Court on the Priority 1 Outreach Efforts proposal. Within ten (10) days of the Response Date, the

City will circulate to the parties a revised proposal that incorporates the parties' comments (to the extent acceptable to the City) and a meeting will be held at a mutually agreed upon time to discuss and develop a final proposal to be adopted for the Priority 1 Outreach Efforts. Within five (5) days after this meeting, the City shall redistribute the proposal for Priority 1 Outreach Efforts to all parties and the Court; and it is further

ORDERED by the Distribution Date, the City develop and circulate to the parties a rental program to provide Priority 1 families with an opportunity to obtain rental housing within the City of Yonkers (the "Rental Program"). The Rental Program must serve Priority 1 families only. The City must describe how the Rental Program will operate, what kind of outreach and support will be provided to Priority 1 applicants, and how the tracking system for participants in the Rental Program will be maintained. By the Response Date, the Plaintiffs shall provide written comments, if any, to the City and the Court on the Rental Program. Within ten (10) days of the Response Date, the City shall circulate to the parties a revised proposal that incorporates the Plaintiffs' comments (to the extent acceptable to the City) and a meeting will be held at a mutually agreed upon time to discuss and develop a final proposal to be adopted for the Rental Program. Within five (5) days after this meeting, the City shall redistribute the Rental Program to all parties and the Court; and it is further

ORDERED the April 14, 1999 Interim Order is hereby rescinded; and it is further

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ORDERED in connection with the services provided through the existing housing program, the City shall receive credits as set forth under the SSLTPO for securing housing for Priority 1 families, and for any other families who have, by May 6, 1999, either received (1) a commitment letter from YAHD; or (2) received preapproval from YAHD to proceed with the purchase of a home. Except as described in this Order, the review processes set forth in the SSLTPO remain in effect.

SO ORDERED.

Dated: New York, New York
June 1, 1999

s/ Leonard B. Sand
U.S.D.J.

APPENDIX 19 — CITY OF YONKERS' SUBMISSION CONCERNING DISPUTED YEAR 2 EXISTING HOUSING CREDITS AND OTHER PENDING MATTERS DATED JUNE 21, 1999

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

- 80 CIV 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH, NAACP, et al.,

Plaintiff-Intervenors,

v.

YONKERS BOARD OF EDUCATION, et al.,

Defendants.

CITY OF YONKERS' SUBMISSION CONCERNING DISPUTED YEAR 2 EXISTING HOUSING CREDITS AND OTHER PENDING MATTERS

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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

80 CIV 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH, NAACP, et al.,

Plaintiff-Intervenors,

v.

YONKERS BOARD OF EDUCATION, et al.,

Defendants.

CITY OF YONKERS' SUBMISSION CONCERNING DISPUTED YEAR 2 EXISTING HOUSING CREDITS AND OTHER PENDING MATTERS

Pursuant to the Court's Order dated June 1, 1999, defendant City of Yonkers ("City") submits the following argument and the annexed Affidavit of John D. Spencer concerning disputed Year 2 existing housing credits and other pending matters. In this submission, the City will address (1) why the 42 additional credits for existing housing for Year 2 should be confirmed by the Court; (2) why the Court

should not approve the current effort of the plaintiff-intervenors Yonkers Branch of the NAACP ("NAACP") to interpret or modify the current remedy orders to require allocation of housing resources on the basis of race; and, (3) why the Court should confirm that the proposed Yonkers Green project does not violate this Court's injunctive orders.[1] In its June 1, 1999 Order, the Court also directed the City to distribute to the Housing Monitor and parties a proposed plan for additional rental housing for Priority 1 families and a proposed enhanced outreach program for Priority 1 families by June 22, 1999. Those submissions are being made in a manner consistent with the process set forth in the June 1 Order.

I. BACKGROUND

On November 6, 1996, following some nine months of discussions between the parties, both Court Monitors and the Court, the Court signed the Second Supplemental Long Term Plan Order ("SSLTPO"). That order placed responsibility with the City to implement the new construction and existing housing programs necessary to achieve the goals of part VI of the 1986 Housing Remedy Order. The SSLTPO provided, at paragraph 2, that "[u]pon attainment of the objectives of paragraphs 1 [new construction] and 2 [100 units per year for six years) of this Order, the City shall be deemed to have achieved all of the requirements of the 1988 Consent Decree.

---

1. While the Court's June 1, 1999 Order did not direct submission on items 2 and 3, it is our understanding from conversations with counsel that submissions on those items will be made by the plaintiffs by June 22, 1999 and the Court is seeking to resolve all pending housing issues.

Decree. LTPO, SLTPO and part VI of the HRO." Since the dissolution of FHIO and opening of the Yonkers Affordable Housing Department ("YAHD") in February 1997, the City has sought to demonstrate that the Court's trust in the City to deliver results was well-placed.

Immediately following entry of the SSLTPO, the City designated a portion of the former Rory O'Moore Park for newly constructed housing in northeast Yonkers. This is a site that was considered in 1987, but deemed unusable because it was dedicated parkland. Mayor Spencer enlisted the assistance of Governor Pataki and local legislators to pass legislation de-dedicating the site *in a matter of weeks*. The City then met stiff resistance in the County Legislature to obtain a waiver of the County's reverter interest in the former park site. After an unsuccessful first vote, the Mayor personally led a charge that gained the County's approval of a change in the use of the property. A developer has been selected and a development agreement is currently on the desk of the developer for signature.

After lengthy negotiations by the former Housing Special Master, the Mayor signed a development agreement with the Cross Street developer in April 1997. The City then had to renegotiate substantially increased subsidies to the developer resulting in a March 1998 Subrecipient Agreement and led (perhaps dragged) the developer each step of the way through the remaining regulatory process. Finally, and only after the City put the developer in default, the developer closed title with the City in May 1999 and construction is underway.

At Hoover Road, after unsuccessful efforts to move forward with Sparrow Construction, in October 1998 the City

selected and all parties approved a new developer for the project. A proposed development agreement is currently under review by the developer.

Finally, the Yonkers Avenue rental project has recently received all outside subsidy approvals and is now moving toward construction. Demolition and other site preparation work by City contractors is currently underway.

In all respects, the logjam in each of these new construction projects has been broken and they are moving to completion. But, the City believes the real story of the success of the SSLTPO is in the existing housing program. In its first two years alone, the existing housing program has provided more affordable housing to LTPO beneficiaries than the entire new construction program ever will. And, it is doing so in a far more integrative manner than the new construction program possibly can.

The YAHD opened in February 1997. It spent its first six months developing its program and conducting an extensive outreach to previous program applicants as well as new potential applicants. The first existing housing transaction closed in August 1997 and YAHD closed out its Year 1 on February 18, 1998. The City's request of 81.5 credits for Year 1 was eventually agreed to by all parties. Minutes of April 8, 1998 meeting at p.5.

II. YEAR 2 DISPUTED CREDITS

Year 2 of the program was calendared from February 18 through December 31, 1998. The City has requested

confirmation of 85 credits for Year 2. The Court has confirmed 43 credits: 42 credits are currently disputed by the plaintiffs. June 1, 1999 Order at pp. 1-2. In addition, program beneficiaries purchased 9 rental units during Year 2 that the City has not submitted for final credit approval.

The City submitted a letter to the Court, dated February 22, 1999, with supporting documents that addressed then pending issues. Attachment 2 of the City's February 22 submission charted the Year 2 unit production submitted by the City. The letter also identified the areas of dispute with the plaintiffs:

> During the January 21, 1999 monitoring meeting, there was no agreement between the parties about the number of credits the City had achieved. The disputes were as follows:
>
> A. The plaintiffs disputed the City's entitlement for affordable units created by the City's Bureau of Community Development through the Yonkers Community Action Program (YCAP). These units constituted 13 units of affordable housing provided to families that live in Yonkers.
>
> B. The plaintiffs disputed the City's entitlement for credit for the 9 rental units.

C. The plaintiffs disputed the City's entitlement for credit to two units that are under contract to the City's agent but have been rejected by six qualified families.

D. The plaintiffs disputed the City's entitlement to full credit for two units located in the Runyan Heights section of east Yonkers.

Letter from Fitzpatrick to Court, February 22, 1999 at 2. The City did not seek final credit for items B and C, above. *Id.* at 3.

On February 24, 1999, the NAACP raised a new basis of objection. The Monitor Meeting minutes reflect that Mr. Sussman "said the believed 31 Caucasians had made non-desegregative moves and therefore credit for those units was at issue." Minutes (Feb. 24, 1999) at p. 2. During the hearing before this Court, the NAACP objected to the provision of housing opportunities for "white households moving out of Southwest Yonkers, qualifying for funds from the program . . . moving to East Yonkers . . ." Tr. 9 (Feb. 24, 1999). Mr. Sussman, objecting to the City's claim that the program was intended to use race-neutral means to achieve desegregation, claimed "the purpose was to foster integration through providing for minority households to make desegregative moves." Tr. 10 (Feb. 24, 1999). On that basis, the NAACP, with veiled support from the United States, objected to providing credit for transactions involving nonminority applicants that purchased affordable housing in the target neighborhoods.

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During the February 24 hearing, there were a number of issues raised by various parties. The Court's comments were limited. The Court directed that consideration be given to the "submission to the Court of a proposed revision to the remedy order designed to increase the ability of the Priority 1 class members to have greater housing opportunity." Tr. 41. The Court further suggested that greater incentives be created to concentrate on Priority 1 and the parties "more carefully define what is meant by furthering the integrative purposes of the order." Tr. 35. The Court did not find that the City was engaging in "segregative transactions" as urged by Mr. Sussman. The Court said nothing to suggest this program should be race based. The Court indicated there is no point in debating what has occurred in the past and the current effort should be prospective in nature. Tr. 34-35. The Court stated that the YCAP issue is part of the credit confirmation requested by the City and should be given a high priority by the Monitor. Tr. 42.

While the NAACP asserted during the February 24, 1999 hearing that the orders require race-based actions by the City in allocating affordable housing benefits, tr. 10-12, in more recent meetings counsel has acknowledged that it is necessary to modify the current orders to require race-consciousness. See, May 18, 1999 Monitoring Minutes (forthcoming). The City contends that the current orders use race-neutral criteria to achieve desegregation, all parties have always interpreted the orders to be race-neutral, and in order to modify the orders the NAACP should seek modification under the standards of Rule 60(b), F.R.Civ.P. and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1991).

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The City will address each of the disputed credit issues below. But, before addressing those issues, a review of the basic requirements of the LTPO is appropriate. The LTPO created two qualification requirements for applicants families. First, a family had to qualify under one of the three stated priorities set forth in the 1989 LTPO:

> To the extent not inconsistent with other applicable occupancy and financial criteria, the City shall endeavor to give occupancy priority to:
>
> 1) persons who, between January 1, 1971 and the date assisted housing pursuant to this Decree is made available, have been residents of public or subsidized housing in the City or Yonkers. Such persons shall be given the first opportunity to apply for such housing, which opportunity shall be afforded up until thirty (30) days following the date the final assisted housing units pursuant to this Decree are made available. Occupancy choice from among such persons applying shall be on a first-come, first served basis;
>
> 2) residents of the City of Yonkers; and
>
> 3) persons employed in the City of Yonkers.

Long Term Plan Order, ¶ 4(f) (June 13, 1998). None of the subsequent orders have modified those provisions. Second, applicant families are required to meet income criteria of, currently, under 100% of Westchester area median. SSLTPO, ¶ 5. With respect to the housing itself the unit must be "in a structurally sound building," "the location of the unit furthers the integrative purposes of the LTPO," and the building should be "in stable fiscal condition . . ." SSLTPO, ¶ 6 (Nov. 6, 1996). The locational requirements of the housing are more specifically stated in the HRO, section VI, and LTPO, ¶ 2 as "residential areas of east and northwest Yonkers." It is well known that those areas are those portions of Yonkers east of the Saw Mill River Parkway or north of Glenwood Avenue.

A. YCAP Units

During both Year 1 and Year 2, the City annually provided about a dozen affordable housing units to qualified applicants through the Yonkers Community Action Program ("YCAP"). Those units were funded with federal HOME funds rather than federal CDBG funds held in the Affordable Housing Trust Fund.[2] The program is administered in the City's Community Development Department rather than the Affordable Housing Department. In all other respects, the programs are identical. Families must meet LTPO income criteria, they must meet the priorities of the LTPO, units must meet the same locational criteria as YAHD units and the units are covenanted for thirty years in the same manner

2. The SSLTPO, at ¶ 11, encourages the City to aggressively seek and use additional outside funding for implementation of the order. The City's use of HOME funds for the SSLTPO program is in furtherance of that requirement.

as the YAHD program. The plaintiffs have objected to credit for these units because the families that purchased the Year 2 YCAP units were qualified under the second priority ("Priority 2") rather than the first priority ("Priority 1") of the LTPO. That is no basis for rejecting credit for these affordable units.

During Year 2, thirteen units meeting LTPO criteria were funded with YCAP's HOME funds. The City's race-neutral program of economic integration furthered the racially integrative purposes of the orders. The thirteen units were purchased by six black families, four Hispanic families and three other race families. See, attachment 2 to February 22, 1999 letter from Fitzpatrick to the Court. Nine of the units are outside southwest Yonkers (racial characteristics: 4 black, 2 Hispanic, 3 other). The other four are entitled to one-half credit each. There is no question that this aspect of the City's program meets the integrative purposes of the orders. Racial integration is being furthered through affordable housing opportunities in all parts of Yonkers.

The plaintiffs' objection to the YCAP program is that the families — even though racially diverse and meeting all other requirements of the orders — are Priority 2 rather than Priority 1 families. That is not a basis for rejection of these fully qualified units. While the plaintiffs and the City want to see more qualified Priority One families in the program, the City is already taking the appropriate steps to bring more Priority 1 families into the program.[3] That should not be a basis for after the fact rejection of the City's good faith efforts.

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3. As the City's monthly reports demonstrate, in November 1998 a letter was sent to all public housing residents in Yonkers (Cont'd)

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Since the inception of the City program in 1997, there has been an unresolved tension about the City's latitude in serving Priority 2 and 3 families. The City has made it clear throughout the past two years, and all parties are well aware, that housing benefits are being provided to families that are not in Priority 1 that locate housing and demonstrate that they are ready to purchase housing. Most of these applicants purchase housing ("Client Found Properties") they have located through the local real estate market. They are not purchasing housing that would otherwise go to a Priority 1 applicant. The City has made clear, both in the Monitor meetings and before this Court, that no qualified applicants for existing housing are going unserved. See, Tr. 39, 40, 53, 54 (Feb. 26, 1998). With respect to existing housing, the market supply is greater than applicant demand, there is plenty of first mortgage money available and no Priority 1 client has been turned away or delayed due to lack of subsidy funds. By working with the clients that are ready to purchase, the City has the best chance of making the very ambitious 100 unit annual goal. On the other hand, the City is carefully ensuring that the limited opportunities to purchase affordable units at Cross Street and other new construction projects are strictly allocated based on priority and date of application.

(Cont'd)
with incomes over 35% of median inviting them to apply for Cross Street and other housing opportunities. A large number of new Priority 1 applications were received. In recent weeks. YAHD sent an outreach mailing to over 3000 residents of Yonkers subsidized housing. Four meetings with the recipients of those letters are taking place this month.

During the first year of the program, YAHD agreed that it would provide summary notices of YAHD closings to the parties and Monitor. While the City has not always been timely in providing notices during the past two years many notices of closings for Priority 2 or 3 families have been provided. There has never been an objection on the basis that a closing is inappropriate because the family is not a Priority 1 family. There has been no suggestion that non-Priority 1 existing housing transactions are per se objectionable.

Finally, counsel for the United States has claimed that it agreed to the YCAP units for Year 1, but only on the condition that Year 2 YCAP units be provided to Priority 1 families. Monitor meeting minutes of February 24, 1999, at p. 2. The minutes of the 1998 meetings do not support such a claim. On February 26, 1998, the plaintiffs sought information concerning the covenanting of the units for thirty years and income qualification. Minutes of February 26, 1998 monitoring meeting, at p. 4. That information was subsequently provided and the Year 1 YCAP units were approved for credit. April 8, 1998 minutes at p. 5. There is no record of any agreement or understanding that Year 2 YCAP units must be sold to Priority 1 families in order to qualify for credit. Just as the City fully demonstrated to the parties that the Year 1 YCAP units met LTPO requirements; there is no reason to reject the Year 2 units.

B. Nonminority Housing Beneficiaries

The NAACP has now objected to any credit for assistance to families that are not black or Hispanic. Monitoring minutes (Feb. 24, 1999) at p. 2. Such a position is contrary to the plain language of the Court's orders, the

manner in which the parties have interpreted the requirements of the remedy orders over the past thirteen years. The discussions of the parties when the SSLTPO was negotiated and constitutional jurisprudence governing race-based remedies. The objection is untimely and contrary to the understandings of the parties during two years of monitoring meetings. Moreover, the race-neutral program of the City is very effective in meeting the integrative purposes of the Housing Remedy Order.

While all parties have understood that racial integration of unlawfully segregated neighborhoods has always been a goal of the orders, the remedy used to achieve that goal is a race-neutral remedy consistent with the nature and scope of the violation. The violation was the confinement, by municipal and State action, of public and subsidized housing to southwest Yonkers due to the expected race of the occupants of the housing. *United States v. Yonkers*, 624 F.Supp. 1276 (S.D.N.Y. 1985). The remedy, therefore, has been the provision of public and subsidized housing outside southwest Yonkers, with the expectation that such housing will further racial integration.

Racial integration of neighborhoods by the program has been the expectation of the Court and parties and has been the result of the program to date. The public housing occupants were selected on a race-neutral basis, existing housing opportunities have been provided on a race-neutral basis, and the City's current effort to qualify families for Cross Street and other housing is being done on a race-neutral basis. But, the plaintiffs, claiming that housing opportunities for whites are "segregative," now want to place an additional requirement on the program that individuals receive housing

opportunities based on their race. The issue centers upon how one evaluates the efficacy of the program and the remedy. The City contends that one should evaluate the overall effect of the program in furthering integration of formerly segregated neighborhoods. The NAACP claims each transaction should be looked at individually and discarded if it does not meet their standard for furthering the purposes of the orders. In other words, the City contends that by having an aggressive program of providing affordable housing opportunities in east and northwest of Yonkers that does not allocate resources or exclude on the basis of race, but uses other race-neutral criteria (such as income, former residents of public housing, etc.), the program will assist some nonminorities, but the bulk of the assistance will be provided to minority purchasers that racially integrate neighborhoods.[4] The NAACP says that is unacceptable — *every* homebuyer moving to east or northwest Yonkers should be black or Hispanic.[5] The City contends that such exclusionary practices are unnecessary and fail to meet constitutional strict scrutiny standards.

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4. This notion is similar to the EIP II plan approved for the Yonkers Public Schools. By raising the quality of education for all students, the parties and Court expect the gap in minority and majority outcomes to be narrowed. But, the EIP II plan uses race-neutral programs to achieve that integrative goal.

5. This position is contrary to the basic purpose of the orders to create a pool of affordable housing for a thirty year period. The orders only require that the units be maintained as affordable for a period of thirty years. There are no resale restrictions on units other than income limitations. Therefore, it is reasonable to expect that on resale, some units first occupied by minorities will be sold to nonminorities and some units first sold to nonminorities will be sold to minority families.

The NAACP now claims that this remedy employs race-conscious provisions thereby requiring the City to use race in allocating program benefits. That position is belied by the plain language of the Court's orders and thirteen years of history.

1. The Plain Language of the Orders.

There can be no legitimate dispute that the plain language of the orders does not direct the City to use race as a criteria in providing housing benefits under the Court's orders. Nothing in the Housing Remedy Order,[6] Long Term Plan Order, 1988 Consent Decree, 1993 Supplemental Long Term Plan Order or the 1996 SSLTPO provides that race shall be a factor in providing housing mandated by the orders.

Housing Remedy Order, dated May 28, 1986. The HRO contains nothing that requires or even suggests that housing opportunities to be provided as a part of the housing remedy should be restricted on the basis of race. The source for the subsequent LTPO is section VI of the HRO: it makes no mention of race. Section II.F.3 of the HRO deals with the original Fair Housing Office's responsibilities and contains language that reinforces the race-neutral nature of the housing remedy. Specifically, paragraph 3 required that FHO "provide information to home seekers seeking housing *on a non-discriminatory basis* . . ." HRO at 5. That paragraph

6. The HRO originally provided occupancy priorities for families living in southwest Yonkers with school age children whose moves will further the purposes of the School Desegregation Order. See, HRO, part VII(B). Those provisions were vacated by Order dated April 15, 1988.

further required that FHO "shall perform all of its functions on a continuing and *non-discriminatory* basis throughout the life of this Order. The FHIO shall ensure that *all persons* who request its assistance in obtaining housing are made aware of housing opportunities in all areas of the City." *Id.* (emphasis added). Paragraph 5 required that FHO's affirmative marketing efforts "shall be designed to ensure that such housing is made available to all persons *regardless of race* or national origin and to ensure that persons who, based on past experience, have been least likely to occupy housing in a particular area of the City are fully informed of all housing opportunities there." HRO at ¶ 5. This language indicates that the remedy is to focus on those in public and subsidized housing, but that the remedial housing is to be made available "to all persons regardless of race."

The First Remedial Consent Decree, dated January 25, 1988. Like the HRO, the 1988 consent decree made no mention of the race of housing applicants. Instead, it specified the types of housing to be built and, in Section XV, allocated housing on the basis of family income (but not race).

The Long Term Plan Order ("LTPO"), entered June 13, 1988. Like the HRO and the First Remedial Consent Decree, the LTPO contained no mention of the race of housing applicants. Instead, the LTPO speaks in terms of (1) types of housing to be provided (affordable v. market-rate), (2) income group of the applying family, (3) target areas for housing (east/northwest Yonkers), and (4) priorities for housing based on public/subsidized housing residency, Yonkers residency, and employment in the City of Yonkers, respectively. The LTPO describes the housing remedy as follows:

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- Section 11 sets forth the conditions for construction of multi-family housing in a 20/80 assisted-to-market rate mix. LTPO at 2.

- That same section requires that assisted housing units "be allocated to the income groups specified in Section V of the First Decree," speaking in terms of income group as opposed to race. *Id.* at 3. Subparagraph (c) of that section requires that a certain number of assisted housing units be at least three-bedroom units. *Id.*

- Section 11 then applies the assisted housing requirements to multi-family housing in East and Northwest Yonkers "to assure the provision of assisted housing in a dispersed manner and so to avoid the undue concentration of both public and assisted housing in any neighborhood of Yonkers." The targeting provisions of the LTPO make no mention of race.

- Similarly, the transfer restrictions set forth in Section IV restrict the transfer of assisted housing units to households "in the same income group" and place no restrictions based on race. *Id.* at 6.

- Additionally, the LTPO establishes occupancy priority for the following groups (which are not defined according to race): (1) persons who have been residents of public or subsidized housing in the City of Yonkers; (2) residents of the City of Yonkers; and (3) persons employed in the City of Yonkers. *Id.* at 8.

The LTPO speaks not in terms of race, but rather in terms of income, location, and public-housing residency.

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2. The Parties' and Court's Past Interpretation Of The Orders.

The Court and the parties have always interpreted the orders in a race-neutral manner. An examination of the past record is helpful confirming that fact and in understanding what is meant by the term "integrative purposes of the LTPO," as that term is used in SSLTPO. ¶ 6. *See*, Tr. 35 (Feb. 24. 1999) (Court directed the parties to consider this point further).

In understanding the early positions taken by the United States and NAACP concerning the remedy, one should recall that it was the clear position of the United States Department of Justice during the 1980's to avoid the use of race-preferences or race-exclusions in remedies and other State action. *See, e.g., United States v. Starrett City Associates*, 840 F.2d 1096 (2d Cir. 1988). References to the race-neutrality policy of the United States were made in early briefs filed in this case. For example, in 1986 the NAACP distinguished itself from the government in its unsuccessful effort to make race a criterion in providing housing:

> Intervenors strongly disagree with the suggestion [of the United States] that . . . "the first priority for occupancy of rental or sale units made available in East Yonkers pursuant to this Order . . . shall be given to individuals who can demonstrate that they have been victims of the City's discriminatory housing policies." This provision is senseless in a class action where the entire class of blacks eligible for low and

> moderate income housing have so evidently been victimized (and continue to be offended) by the City's determined unconstitutional policies. In addition, the United States would set up another fact-finding process to adjudge which of several persons were more directly affected by systemic discrimination. While reflecting the clear ideological biases of this administration, such a clause would be impossible to implement and only lead to more confusion.

Post-Remedy Trial Brief of NAACP With Regard To Appropriate Housing Remedies, dated May 19, 1986, at 23. In 1986, the United States urged the implementation of race-neutral assisted housing programs that would assist minority applicants but not to the exclusion of others:

> The FHO should ensure that all persons who request its assistance in obtaining housing on a nondiscriminatory basis are made aware of housing opportunities in all areas of the City.
>
> * * *
>
> . . . we suggest that the remedial plan be redesigned to strengthen the City's obligations and provide assurance that there will be increased housing opportunities made available to the minority community of Yonkers on a non-discriminatory basis outside the southwest quadrant.

Response of the United States To City of Yonkers' Remedial Plan, dated March 13, 1986, at 13, 22.

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By 1988, when the LTPO was constructed, it had become clear that race was not going to be a part of the remedial plans. On March 1, 1988, the Second Circuit released the *Starrett City* decision. On April 15, 1988, the Court entered an Order that vacated the original Occupancy Priority provisions of part VII(B) of the Housing Remedy Order that provided preferences for persons living in southwest Yonkers with school age children that could assist in furthering the School Desegregation Order.

On May 20, 1988, the United States and NAACP moved the Court to enter the LTPO. Their joint comments in support of the LTPO made clear that the race-neutral language of the LTPO was designed to assist the most likely victims of past discrimination:

> Part (f) establishes a housing priority for eligible persons who are most likely to have been adversely affected by the discriminatory housing practices for which the City of Yonkers has been found liable. In addition, priority is given to Yonkers residents and those working in the City.

Plaintiff and Plaintiff-Intervenors' Joint Amended Long Term Plan Comments, dated May 20, 1988, at 6, 7. Nothing in the submissions of any party in 1988 suggests that LTPO benefits were to be allocated on the basis of race. Nor did the plaintiffs' comments suggest the three priorities are strictly sequential.

Since the entry of the LTPO, it has been consistently interpreted in a race-neutral fashion. On November 8, 1990,

the Court held a status conference concerning the NAACP's suggestion that an LTPO modification was needed. Karen Hill argued that it was difficult to implement the 80/20 goal because developers were backing away from any involvement in LTPO development. The City explained the difficulties in terms of a downturn in the real estate market. There was no mention of race-conscious remedies during the hearing. Tr. (Nov. 8, 1990).

The Yonkers City Council discussed the NAACP's 1991 motion to modify the LTPO at a meeting held June 26, 1991. Although nearly all City Council members opposed the NAACP motion, then-Council member Joe Farmer spoke in support of the NAACP motion, as follows:

> The NAACP has proposed an alternative to the 4,000 units. It disappoints me that we are still putting out the same misinformation. These 800 units are not subsidized people who are not working. It's for low and moderate working class people. *It is not race specific.* It is 800 units of affordable housing that people will be selected on the basis of their income through some equitable way.

That information is not put out there. City Council Transcript (June 26, 1991) at 18-19.

Throughout the proceedings dealing with the NAACP's 1991 motion, it was made clear that the program was one of economic integration and not race preferences. The City submitted an affidavit from its expert, Paul Phillips, which described the NAACP proposal as follows:

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> The NAACP proposal would represent a radical alteration of the [LTPO], which would depart significantly from the plan's original goals. For example, it would abandon the goal of furthering socio-economic integration. This goal was to be achieved in two ways: (1) by encouraging the production of affordable units outside of Southwest Yonkers, and (2) mandating architectural integration of those units within mixed-income inclusionary projects.

Phillips Aff., dated July 8, 1991, at 6. In reply to the City's cross-motion, Mr. Sussman submitted an affidavit. The following passages reflect Mr. Sussman's characterization of the NAACP's race-neutral proposal:

> This will not lead to racial segregation, but, rather the integration of white communities by residents of subsidized housing developments. . . . Such a result is tailored to the City's constitutional violation. Moreover, the contemplated housing developments will contain an economic mix, families earning between 50% and 120% of median income; when combined with the location of the housing, this will insure internal racial integration.
>
> * * *
>
> Nor does the NAACP plan to abandon the goal of socioeconomic integration, as Phillips claims. First, the projects themselves would be

> economically and, we believe, racially diverse, serving families between 50-120% of median income, as the long term plan contemplates. Second, the developments would be located in east and northwest Yonkers, areas overwhelmingly populated by Caucasians.

Sussman Aff., dated July 11, 1991, at 19, 21-22.

On April 14, 1992, the City Council approved a modification to the LTPO that was then agreed upon by all parties. That document was filed with the court and, like the LTPO, speaks in terms of housing types, income priorities, and priorities based on residence. *See* City's Modified Long Term Plan Order at 14, 18-19 (Exh. A to Motion to Amend, dated June 9, 1992). On July 15, 1992, the Court held a hearing concerning the 1992 submissions. The Court discussed (1) the use of existing housing; (2) the availability of units and sites; and (3) tenant eligibility. The Court proposed allowing the City to go forward and demonstrate the availability of existing housing to meet the requirements of the housing remedy. Mr. Sussman raised the issue of the "economic criteria" to be used to determine the eligibility of applicants. It is clear from this transcript that the discussions involved these non-racial criteria (i.e., income and housing type) and did not include discussions of race-conscious criteria or remedies.

This Court conducted extensive hearings in June and July 1993 directed to the development of plans for additional LTPO programs. The City's trial brief focused on the issues of new construction versus existing housing, site density,

and planning feasibility. Nothing in the document suggested that anything other than the race-neutral provision of housing opportunities was contemplated. *See* Trial Brief of City of Yonkers, dated June 3, 1993.

The NAACP's 1993 trial brief responded to the City's proposal and argued for different densities and for greater emphasis on new construction. The closest the NAACP comes to mentioning race is the following:

> 4. As this Court declared frequently early in the remedial process, providing housing opportunities for class members should be a certain outcome of whatever plan is chosen, not something which can be vetoed by parties without the Court's jurisdiction and control.
>
> 5. The housing to be provided must serve either directly or indirectly those whose rights have been violated. Providing new housing opportunities for those of higher income and calling that a remedy for the adjudicated violation is hypocritical and immoral.

See, NAACP Pre-trial Brief, dated June 3, 1993, at 2-3. The NAACP, however, did not advocate a race-conscious approach. Instead, the NAACP focused on the income groups (as opposed to racial groups) to be targeted for this subsidized housing.

The United States' 1993 trial brief addressed the same density and existing-housing issues that the City's and

NAACP's briefs addressed. The United States did not propose or suggest any type of race-conscious consideration of housing applicants. *See* Comments of the United States, filed June 4, 1993.

Like the other prehearing briefs, FHIO's focused on the use of existing housing and on project density. FHIO's brief did not suggest any race-conscious criteria, but instead proposed lower income-eligibility levels to increase inclusion in the program. *See* FHIO Pre-hearing Memorandum, dated June 7, 1993.

Trial on the cross-motions to modify the LTPO began on June 10, 1993. At the beginning of the trial, this Court outlined the following three issues for trial: (1) the availability of existing housing; (2) new construction: and (3) systemic changes needed for housing implementation. On pages 9-20 of the transcript, there is an initial colloquy between Mr. Sussman and this Court, during which Judge Sand asked Mr. Sussman what he thinks the City must do to provide meaningful affordable housing opportunities to class members. Mr. Sussman gave a four-part answer; however, during that answer he did not mention restricting housing opportunities according to race or the recent notion that persons must move into areas where they are in the minority.

At the close of the existing-housing phase (before taking up new-construction issues), Judge Sand made preliminary findings from the bench. The Court's comments focused on its decision that 250 units of existing housing (as advocated by U.S. expert Rick Cohen) was appropriate, albeit optimistic. In discussing what an "available" existing-housing unit was, the Court made the following comments, relevant here:

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> The definition of "availability" which we have been using encompasses: *one, location to be outside southwest Yonkers and in a neighborhood which furthers the integrative objectives of the remedy order;* two, that it be in acceptable physical condition which relates to the unit and the building or the complex in which it is located; three, that the cooperative or condominium in which the unit being located be fiscally stable; and four, that the approval by such co-op boards or other entities whose approval is required be forthcoming.

Transcript at 815 (emphasis added). Although the Court discussed locations outside southwest Yonkers as "integrative," there was no mention made of any requirement that only black applicants could move into housing located outside of southwest Yonkers (or vice versa).

During the new construction phase of the 1993 trial, the United States recalled Rick Cohen to discuss new-construction issues. Counsel for the United States, Christopher Shaheen, specifically asked Cohen to discuss the "economic integration" aspects of FHIO's proposal, as follows:

> Q Let's turn to the issue which has been discussed, [in] some detail by other witnesses, which relates to the income mix of developments. The FHIO proposal attempts to — is a mixed income proposal which attempts to combine both affordable and market units within the same development. Is that an approach that you view as desirable?

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A Economic integration, I think, is a laudable goal in and of itself.

Transcript at 1535. Cohen then went on to explain previous instances where he has tried to achieve "economic integration" within a development and states that economic integration is relevant to racial integration. *See id.* at 1536. Later in Cohen's testimony, the Court asked what the effect of resale restrictions are on the LTPO goal of "economic integration," as follows:

The Court: Now, if you do that, what is the impact of doing that on the goal of the mix — of economic integration?

The Witness: If I understand the range of incomes in the LTPO correctly, there's a range that goes from below 50% to 120% of median. And to me that strikes me as a pretty reasonable income range to consider as economic integration in and of itself.

Secondly, to put these units in areas where they're, the income levels of the areas themselves are much higher, that also achieves integration. So that although they are not fully integrated with people on site above 120% of

> median, they are still in an area where they achieve a range of 50-120. And the area around them may be higher than that.

Transcript at 1542. Throughout Cohen's testimony, it was clear that the Court and the expert are evaluating the new construction proposals, in part, according to each proposal's ability to achieve economic integration. In other words, the focus was on ensuring an effective economic mix rather than on limiting housing availability and opportunities according to race.

The City recalled its expert, Paul Phillips, to discuss new-construction issues. Like Cohen, Phillips evaluated the FHIO proposal "in terms of its potential for socioeconomic integration," as follows:

> A Well, I think the issue with regard to socio-economic integration in the FHIO proposal presumes that there is going to be a market for the market rate units. That is the whole idea for the inclusionary housing, 80/20 housing type project.
>
> If it works, if it is feasible. I think it is clearly a type of plan that promotes socioeconomic integration . . . .

Transcript at 1763; *see also id.* at 1770. Again, the new construction proposals were evaluated in terms of "economic integration."

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At the close of the new construction phase of the hearings, this Court asked the parties to brief certain issues regarding the market component of the remedy. One of the Court's questions as paraphrased by the United States was this: "If one of the underlying purposes of the market rate units is to promote socioeconomic integration through the expectation that the purchasers of such units will differ from the purchasers of the LTPO units, how do we enforce such a goal? Are there legal means available to discourage persons who resemble the beneficiaries from purchasing the market units?" Supplemental Memorandum of the United States at 7. The United States responded as follows:

> We have serious concerns about whether there are any legal means available to enforce such a goal. Obviously, the Fair Housing Act prohibits any limitation or preference on the basis of race, color, or national origin. 42 U.S.C. § 3604. Nor can the use of such a quota or limitation be justified on the grounds that its purpose is to promote racial integration. *United States v. Starrett City Associates*, 840 F.2d 1096 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988). This is particularly true where, as here, the restriction most probably would have the effect of limiting housing opportunities for minorities. *Id.* Thus, the law is clear that there can be no racial or ethnic limitation with respect to the market-rate units and we do not understand the Court to be suggesting that such a restriction be considered.
>
> . . .

> Second, such a restriction, while facially neutral, could be subject to challenge under the Fair Housing Act as one which has the effect of excluding minorities. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988). Further, given that this is an affordable housing program as well as an integrative one, it may be appropriate to ask whether it is even desirable to seek to prevent persons in need of affordable housing from obtaining such housing to further the goal of providing more on-site diversity.

See id. at 7-8. It is clear from this passage that the United States was wary of any racial restriction on housing opportunities. Rather, its post-hearing brief again focused on integration using income groups. *See id.* at 4.

The NAACP responded to that same question in the following manner:

> The current LTPO seeks to achieve project-by-project integration through an 80-20 model. The "20" is a short-hand for a broad income range, from 0-120% of median income and the LTPO provides a formula for the provision of housing to segments of defined segments within this range. Each unit so provided is to count toward the goal of 800 units of subsidized housing.
>
> The LTPO contemplated that "subsidized families," as defined by the income range, would

be integrated with higher income families (above 120% of median) who were assumed to be a significant part of the housing market.

According to the uncontradicted trial testimony and exhibits, FHIO has established that the "market demand" for newly constructed housing units would be affordable, in most East and Northwest Yonkers' locations, to households of four persons earning approximately 90% of county median income. Stated differently, this means that households with such incomes, that is, incomes below 100% of county median income, which is $55,000/annum, are abundant in overwhelmingly white neighborhoods of East and Northwest Yonkers.

This finding is proof positive, when combined with the residential preferences of class members, including those with such incomes, that substantial racial barriers still confine black and Hispanic families to southwest Yonkers.

It is clear from the FHIO analysis that ethnicity, not income, operates as a primary barrier to mobility for household in the 80-120% median income group and that East Yonkers is replete with Caucasian families who have incomes in the same range as these class members.

This overlap presents an opportunity for achieving socioeconomic integration, provided

the newly created "market rate" housing units are fairly made available. In short, under the FHIO plan, integration will be achieved with some demand for ownership and rental housing from Caucasian households with incomes which overlap those of the upper half of the beneficiary group.

Plaintiff-Intervenors' Post-Hearing Submission, at 1-3.

FHIO responded to that same question as follows:

E. *Legal Enforcement of Economic Integration*

The FHIO experts are not aware of any existing programs which enforce economic integration by excluding persons who can afford market housing from purchasing such housing in favor of higher income individuals. To the extent AHC funds can benefit a market rate unit affordable at or above 120% of median income, the sale of such a unit can be limited to families earning such a median income consistent with the subsidy program. As FHIO understands the question posed by the Court, in essence what is being asked is whether a preference to sell or rent market rate units to higher income families can be established in furtherance of economic integration. While FHIO's research on the matter has not been exhaustive, it appears that such an enforced preference would work contrary to the goals of the remedy. To require enforcement

> presumes simultaneous competition or the exclusion of lower income families who can afford a market rate unit. Such enforcement would further restrict housing opportunities of the relatively lower income families in favor of a higher income family with more housing opportunities. Enforcement of such a nature also presents the possibility of having a disparate impact on potential beneficiary class families at the higher median income levels. Consequently, FHIO's experts are of the opinion that the market rate units should be sold and rented to families who can afford them on the basis of a lottery where appropriate or on a first come first served basis where appropriate, while keeping in perspective the priorities of the LTPO.

FHIO Brief, dated July 9, 1993, at 10. These responses to the Court's question show that the parties were reluctant to impose racial restrictions on the market-rate units that would limit the housing opportunity of otherwise qualified black applicants, even if such an effort might be in furtherance of integration.

At another point in the FHIO brief, FHIO described the basis for the LTPO as follows:

> The primary basis for the opinion is that the purpose of the LTPO is to further a remedy for decades of racial segregation and housing. While affordable housing subsidy programs are utilized to achieve the remedy, the programs themselves

> are primarily targeted to accomplish the creation of affordable housing, rather than create racial integration. (See statement of purposes of subsidy programs, appendix, pp. 1-6). Obviously, the future cannot be predicted, but the below and above market, mixed income approach without resale restrictions or LTPO credit for market rate units, maximizes the potential for economic and racial diversity.

Id. at 8-9 (citing to an attached chart that quotes the beneficiary definition for the various state and federal housing programs used as a part of the remedy).

In its 1993 findings on the new construction component of the remedy, this Court discussed the integrative goals of the new construction program as follows:

> And this is perhaps as good a point as any to comment upon the integrative goals of the housing program. The intent of the Court's order was not simply to create housing, but to create housing which would have a racially integrative effect on the Yonkers community. This integrative effect can be accomplished a number of ways.
>
> First, of course, there is the selection of the neighborhood. All of the housing proposed by both the City and FHIO relate to sites other than those with significant minority population, and in that respect all of the sites under discussion would serve integrative purposes. However, in

> addition to the selection of the site, two other considerations enter into the ability of the housing to be integrative. One is the design and orientation of the site itself. . . . The other manner in which the integrative impact of the housing can be enhanced relates to the selection of the occupants themselves, a point as to which we will have more to say when we deal with the FHIO proposals.

Transcript of proceedings held July 13, 1993, at 1921. Later in its findings, the Court discussed the income mix of housing participants, but did not discuss any racial restrictions on housing applicants. The Court explained the 80-20 market/affordable housing mix as follows: "But what the program is designed to achieve is the creation within an individual building site of a racial-socio-economic integration. If that goal is achievable, it would be a desirable goal consistent with the objectives of the LTPO." *Id.* at 1931. Thereafter, the Court entered the 1993 SLTPO, which contains no race-conscious requirements.

From March through November 1996, the City and all parties, with assistance from Ms. Melkonian, Dr. Pastore and the Court, negotiated the terms of the SSLTPO. The correspondence and documents from that negotiation made clear that the City intended to continue the race-neutral income-based selection criteria of the LTPO program. For example, Mayor Spencer's May 22. 1996 letter to the Court made clear that the City "program is intended to provide housing opportunities to *all* qualified applicants." Emphasis in original. *See also*, letter, Mayor Spencer to Court, July 11, 1996; and, letter, Fitzpatrick to Sussman and Houk, July 22, 1996.

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On the other hand, Mr. Sussman sought to change the occupancy priorities of the LTPO to provide for the provision of housing to "class members." *See*, May 31, 1996 Memorandum from Mr. Sussman to D. Pearson; June 14, 1996 Memorandum from Mr. Sussman to Mayor Spencer; Affidavit of John D. Spencer (annexed hereto). The difference is very important. The term "class members" refers to the certified plaintiff class of minority citizens on whose behalf the case was originally filed.[7] The current LTPO does not provide housing for "class members"; it provides housing for persons who have lived in public or subsidized housing in Yonkers at any time since 1971 and persons who currently live or work in Yonkers.

The plaintiffs' 1996 effort to change the beneficiaries of the LTPO to a race-based class was unsuccessful and flatly rejected by the City. While earlier plaintiff drafts of the SSLTPO changed the housing beneficiaries to "class members," the October 16, 1996 draft prepared by Ms. Houk

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7. The original certified class represented by Mr. Sussman in this case is virtually inactive. The only active private plaintiff is the Yonkers Branch of the NAACP. There is no active class representative that the City knows of and the definition of the "class" is uncertain. Upon recent inquiry, Mr. Sussman advised the undersigned that the class consists of all black and Hispanic residents of public or subsidized housing in Yonkers since 1971. But, in 1986, Mr. Sussman signed his papers filed in this case as "Counsel for Yonkers Branch NAACP and the class of blacks in publicly assisted housing." *See*, Response of Plaintiff-Intervenors to Remedial Plan of City of Yonkers (March 20, 1986, at p. 23). But, *see*, tr. 4 (Feb. 24, 1999) (Mr. Sussman acknowledges that in 1981 Court defined class in nonracial terms as "individuals who resided in public or subsidized housing . . .").

dropped that language. The Mayor, all parties and the Court's Monitors were all privy to the discussions wherein it was made clear that the final agreed-upon SSLTPO tendered to the Court in November 1996 was designed to be embodied a race-neutral housing plan. *See*, Affidavit of John D. Spencer, annexed hereto.

Since the entry of the SSLTPO, the parties have met periodically to monitor progress and seek to resolve disputes. *See*, SSLTPO, ¶ 13. During those meetings, it has been acknowledged that this is not a program where housing is to be allocated on the basis of race; but, rather, a program of economic integration that is intended to result in racial integration. For example, the monitoring minutes reflect that during the course of reviewing a chart of closed transactions with the racial demographics of the census tracts, Mr. Sussman acknowledged that although the orders do not mandate racial preferences, the program will assist minority applicants:

> D.H. provided updated census tract information on closed transactions. M.S. said that although there is no direct racial requirement in the remedial order, the class he represents is predominantly black and Hispanic and there is indirectly a priority for those classes.

Monitoring minutes, January 22, 1998 at p. 5. That position is contrary to the position Mr. Sussman takes a year later that the orders have race-based requirements.

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The NAACP now claims that the remedy *must* be race-conscious because it is a remedy in a race discrimination case. Tr. 3, 4 (Feb. 24, 1999). That is not the law. It is contrary to over ten years of Supreme Court precedent.

It is well recognized that a constitutionally-valid program of governmental race-preferences — whether voluntary or court-ordered — must meet strict scrutiny analysis of equal protection. *City of Richmond v. J. A. Croson Co.*, 489 U.S. 469 (1989); *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), *Ensley Branch v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Engineering Contractors Association v. Metro Dade County*, 122 F.3d 895 (11th Cir. 1997); *Brewer v. West Irondequoit Central School District*, 32 F.Supp. 2d 619 (W.D.N.Y. 1999); *Hillyer v. County of Suffolk*, 977 F.Supp. 202 (E.D.N.Y. 1997). Under the narrow tailoring prong of strict scrutiny, the issue is not whether the racial preference is effective in meeting the desired end. Rather, the preferences must be drawn as narrowly as possible and "must only be a last resort option." *Engineering Contractors*, 122 F.3d at 926. "If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Id.* at 927.

The courts have adopted a now-familiar analytical structure for evaluating whether a race-conscious remedy is narrowly tailored:

> ". . . (1) the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief, including the availability of waiver provisions; (3) the relationship of

> numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties.

United States v. Paradise, 480 U.S. 149, 171 (1987); *Hillyer v. County of Suffolk*, 977 F.Supp. 202 (E.D.N.Y. 1997).

None of this Court's very extensive past factual findings analyze a race-based remedy using, proper strict scrutiny analysis. Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. *City of Richmond v. Croson Co.*, 488 U.S. 469, 510 (1989).

A race-conscious program cannot be justified because such a program is considered effective. That is not the standard of constitutionality:

> Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may sue to treat a race-based problem. Instead, it is the strongest of medicines, with many potentially harmful side-effects and must be reserved for those severe cases that are highly resistant to conventional treatment.

Engineering Contractors, 122 F.3d at 927.

The caselaw is clear that a race-based remedy is unconstitutional when a race-neutral remedy will suffice. Here, the City has demonstrated the effectiveness of its race-

neutral program. The program is having a significant effect in integrating formerly segregated neighborhoods. Under such circumstances, a race-conscious remedy is unnecessary and unconstitutional.

3. The Contested Moves Are Not Segregative And The Standards For Modification Have Not Been Asserted Or Met.

As the City explained above, the NAACP has lodged objections to those transactions that did not involve black or Hispanic homebuyers. The LTPO does not require or permit the City to act in a race-conscious fashion, the orders have always interpreted as race-neutral and it was the understanding of all parties when the SSLTPO was negotiated and entered that its program requirements are race-neutral.

A race-conscious remedy now is inappropriate and unwarranted. But, if the NAACP seeks such a modification of the SSLTPO and prior orders, it should file an appropriate motion under Rule 60(b), F.R.Civ.P., and demonstrate that modification is warranted. The standards for modification are set forth in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1991). And, any such remedial relief must meet the requirements of strict scrutiny, as discussed above.

C. Runyan Heights Moves

The City previously submitted two closings for full credit each involving moves by qualified LTPO applicants to homes they selected in the Runyan Heights section of east Yonkers.

The NAACP took the position previously that such moves should receive only half credit in the same manner as a move to southwest Yonkers. Monitoring Minutes of Feb. 24, 1999 at p. 1.

The City has evaluated the language of 16 of the SSLTPO wherein the location of the unit should further "the integrative purposes of the LTPO." Consistent with our analysis and the discussion in subsection B, above, and if the Court accepts our proposal (see part IV) to identify appropriate locations based on the racial composition of the census block, the City agrees to take one-half credit for each of these two units.

III. YONKERS GREEN PROJECT

For many years the City has been working on an urban renewal project at the Ashburton/Madison site in southwest Yonkers. The site was assembled in the late 1980's by the City's Bureau of Community Development with federal CDBG funds. Various studies were conducted during the early 1990's to address the appropriate means of developing the site. A number of approaches were considered including commercial use, residential use or a mixture of the two. After many years of study it was determined that the site should be developed with affordable two-family homes. Each two-family home would include an owner's unit and a rental unit. The developer/sponsor of the project is a southwest Yonkers church. Various environmental studies have been conducted and the project has received much attention over the years.

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Some time back, the State brought the project to the attention of the parties in the monitoring process advising that it had received an application from the developer for Affordable Housing Corporation assistance to the project. During the monitoring process, the State was advised not to displace funds that would otherwise be provided for court ordered projects through the provision of funds to the proposed Yonkers Green project. Last year, the State committed $1 million in Affordable Housing Corporation funds for the first phase of this homeownership project. These funds are in addition to those required by the State settlement order. The project has also been supported by the City of Yonkers.

Counsel for the NAACP has expressed his view that the Yonkers Green project is violative of this Court's 1986 injunction against the City. Tr. 12 (Feb. 24, 1999) The United States contends it has no objection to phase I of the project so long as the priorities of the LTPO are waived and the project is affirmatively marketed to nonminority residents of east Yonkers. Tr. 29, 30. The City does not object to those conditions. Because of the NAACP's objection, the State AHC has stopped processing the subsidy. For the reasons stated below, the City of Yonkers contends that nothing in the proposed Yonkers Green project violates any order of this Court. Moreover, the City contends that the project furthers both the letter and spirit of this Court's orders.

The NAACP is wrong in claiming that the proposed Yonkers Green project violates the HRO. The general injunction provided in paragraph I of the 1986 Housing Remedy Order permanently enjoins the City of Yonkers from:

"(b) confining public or subsidized housing to southwest Yonkers on the basis of race or national origin;

(c) otherwise intentionally promoting residential racial segregation in Yonkers . . ."

Neither of these provisions of the 1986 injunction is violated in any respect by the proposed project. While the construction of such housing certainty provides additional subsidized housing in southwest Yonkers, that alone does not provide a basis to claim that the injunction has been violated. Rather, the injunction prohibits the City from "confining" subsidized housing to southwest Yonkers *on the basis of race*. First, the City is not confining subsidized housing to southwest Yonkers, it is making it available in *all* parts of Yonkers. Second, the City's action in furthering the Yonkers Green project can in no manner be demonstrated to be racial in nature. Nor does the project promote residential racial segregation. There is no injunction against the provision of affordable housing in southwest Yonkers and no basis for the NAACP to allege that the injunction has been violated.

The claim that the HRO is violated by this project is particularly disturbing to the City in view of the provisions of the SSLTPO designed to ensure that southwest Yonkers is not neglected while resources are provided for Court ordered housing in east and northwest Yonkers. For that reason, paragraph 12 of the 1996 Second Supplemental Long Term Plan Order provides:

> The parties that it is in their respective interest to ensure that substantial efforts are made to upgrade

> the conditions of residents of southwest Yonkers, including those currently residing in public and/or subsidized housing. The City, working with input from the NAACP, community representatives and elected officials from southwest Yonkers, shall implement housing policies to address such objectives.

It is curious that the NAACP would require the City to commit to assist southwest Yonkers and upgrade its housing stock and at the same time claim that such actions by the City are violative of the general injunction entered in 1986. The Yonkers Green project does exactly what the more recent and specific Court order provides, it is designed to upgrade housing opportunities in southwest Yonkers. Moreover, it would provide additional home ownership and rental opportunities for former residents of public and/or subsidized housing as well as other interested families.

The State AHC committed to provide a subsidy that is separate and apart from the subsidies provided in the December 1998 settlement agreement. The State subsidy furthers the Court's expressed desire to ensure that southwest Yonkers is not neglected while affordable housing is provided in other parts of Yonkers. The State's subsidy provides housing resources for all citizens of Yonkers, including those supposedly represented by the NAACP. Now, the State has halted the processing of that subsidy at the behest of the NAACP. The City strongly believes that this project should be supported by the Court. The City respectfully requests that the Court confirm that this worthwhile effort does not violate its injunctive orders.

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IV. PROPOSED ORDER

The City contends that its existing housing program is effective in meeting the integrative purposes of the Housing Remedy Order. At the same time, the City agrees that the program can be improved. The City is working cooperatively with the Monitor and other parties to develop effective outreach and rental programs to ensure that all Priority 1 families are reached and effectively served.

In the City's effort to serve more Priority 1 families, the City's ability to meet the annual goals of the SSLTPO has been hampered. During the current Year 3, the efforts of the YAHD have already been diverted to these other projects and have diminished production. For that reason, the City agrees with the Court's recent suggestion that double credit be provided for Priority 1 closings. Double credit is warranted due to the extra resources in terms of time and money needed to meet the needs of Priority 1 families.

The Court also suggested that consideration be given to the meaning of the SSLTPO requirement that locations of housing should further "the integrative purposes of the order." Tr. 35 (Feb. 24, 1999). The previous orders have mandated the provision of housing outside southwest Yonkers on a full credit basis and a limited number of units in southwest Yonkers on a half-credit basis. The City suggests that the census block data produced by the Department of Justice (see, map dated December 31, 1998) allows the parties to more precisely identify areas of minority concentration. Units should be facilitated in census blocks with less than 45% black and Hispanic residents. Units in

southwest Yonkers or other areas of more than 45% minority residents would continue to receive half the normal credit for the closing.

Finally, based on the City's current effort to better serve Priority 1 families, the City requests that the current restrictions on assisting Priority 2 and 3 families be lifted.

Based upon the foregoing, the City recommends that the Court's order substantially incorporate the following provisions:

1. In addition to the 43 credits previously confirmed; 41 credits are confirmed for Year 2 under the goals of ¶ 2 of the SSLTPO.

2. Commencing with Year 3, all Priority 1 placements shall receive two credits against the goals of ¶ 2 of the SSLTPO.

3. The target areas for the LTPO are revised to provide that the target area shall be those census blocks of east and northwest Yonkers with under 45% minority residents as defined on the December 31, 1998 map produced by the U.S. Department of Justice.

4. The Court confirms that phase one of the proposed Yonkers Green project does not violate past injunctions of this Court; the City shall ensure that units at the Yonkers Green project are affirmatively marketed to persons in all parts of Yonkers; and, the occupancy priorities of the LTPO shall not apply to the Yonkers Green project.

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5. The provisions of the last paragraph of page 3 of the June 1, 1999 Order are vacated.

Dated: June 24, 1999

Respectfully submitted,

s/ Raymond P. Fitzpatrick, Jr.
Raymond P. Fitzpatrick, Jr.
(RF 1705)
Attorney for Defendant
City of Yonkers

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APPENDIX 20 — AFFIDAVIT OF JOHN D. SPENCER DATED JUNE 17, 1999

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

80 CIV 6761 (LSB)

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH, NAACP, et al.,

Plaintiff-Intervenors,

v.

YONKERS BOARD OF EDUCATION, et al.,

Defendants.

AFFIDAVIT OF JOHN D. SPENCER

John D. Spencer, being duly sworn, states the following under penalty of perjury:

1. My name is John D. Spencer. I have served as the Mayor of the City of Yonkers since January 1, 1996.

2. During the period from February through November 1996, I devoted a substantial amount of time and effort to

the negotiation of the provisions of the Second Supplemental Long Term Plan Order ("SSLTPO"). I wrote and received correspondence and had conversations and meetings with the Court, counsel and representatives of all parties, Marilyn Melkonian and Joseph Pastore. The final SSLTPO was the product of much negotiation and compromise by all parties.

3. Throughout the negotiation of the SSLTPO, I made clear that it was my intent to implement an affordable housing program that would fairly serve all qualified applicants. It was consistently my position that the program would be race-neutral. That position was understood and agreed to by all parties and the Court's monitors. I specifically rejected the effort of the NAACP to give "class members" priority for housing. I understood that was a code for the provision of housing on the basis of race.

4. The current position of the NAACP to make race a factor in housing decisions is completely at odds with the agreements and understandings of the parties in the course of negotiating the SSLTPO.

This 17th day of June 1999.

s/ John D. Spencer
John D. Spencer

Appendix 20

Sworn to and Subscribed before
me this 17th day of June 1999.

s/ Thomas M. Weibrecht
Notary Public
My Commission expires:

THOMAS M. WEIBRECHT
Notary Public, State of New York
No. 4920255
Qualified in Westchester County
Commission Expires May 16, 2000

APPENDIX 21 — LETTER FROM MICHAEL H. SUSSMAN TO HONORABLE LEONARD B. SAND RE EXISTING HOUSING ISSUES DATED JUNE 21, 1999

LAW OFFICES OF MICHAEL H. SUSSMAN
ATTORNEYS AT LAW

MAILING ADDRESS
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* * *

June 21, 1999 — By fax on 6/22 and by regular mail
Honorable Leonard B. Sand
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

re: U.S., et al. v. Yonkers Board of Education, et al.
80 CIV 6761 (LBS)

Dear Judge Sand,

The NAACP strongly opposes granting the City credit for segregative housing moves as it continues to seek. While the City continues to claim that the housing remedy order is "race neutral" and its Mayor and attorney repeatedly asserts that the plan does not and cannot take race into account, the NAACP takes the opposite view and believes that Yonkers has seriously maladministered the existing housing program.

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1. Assisting 29 white families move out of southwest Yonkers to less integrated areas of the city is plainly inconsistent with the housing remedy orders, the purpose of which is to foster residential integration, not segregation. We note that the City apparently received credit for such moves during the first year of the program and no accounting of those moves has yet been provided by the Monitor.

2. Assisting white families with scarce resources make moves from one area outside of southwest Yonkers to another similar area is plainly inconsistent with the housing remedy orders and does not foster residential integration. Such families are already living outside areas of minority concentration and the assistance provided them bears no reasonable relationship to the housing remedy.

3. Allowing the use of affordable housing trust fund dollars for priority 2 and 3 families who were never victims of discrimination and who have no temporal priority, particularly when compared with Priority One families, is plainly inconsistent with the housing remedy order. Under the City's program, a white family currently living in a private home in a white area of Yonkers and earning $75,000 can find a house in another predominantly white area of Yonkers and obtain a subsidy to buy that home. This is not an anomaly and has been an integral part of the city's program for nearly 2 and one-half years. The City has admitted as much, conceding that it has facilitated such moves to bolster its "numbers".

4. Failing to record and report the racial composition of those benefiting from the program and then laughing at NAACP

counsel's request for such information circumvents the integrative purposes of the court's remedy order but, unsuprisingly, has been precisely the city's conduct to date. The court should order the maintenance of such racial data as its collection and analysis is as critical to the housing remedy as is similar data to the school remedy.

5. The NAACP is equally opposed to the facilitation of black home ownership in Runyon Heights, though, again, the city has supported several such moves. It should get no credit for them.

6. The YCAP program has not been operated in a manner consistent with court orders; priority 1 families were not given first preference for such units and the city deserves no credit for their occupancy. We join the United States in opposing any year II credit for this program.

7. The NAACP opposes the so-called Yonkers Green project; this project, sponsored by Yonkers on urban renewal land in southwest Yonkers, promises to build 120 new affordable housing units in that area of the city. This number dwarfs the new construction of affordable units in the City's housing remedy program and should be enjoined as segregative. We have placed the State of New York agencies on notice of our view that this project in segregative and should not be financed. We reiterate that view now. The United States has apparently backed off from its opposition to this development, but we believe that affirmative marketing will not assist in integrating the resulting units and, therefore, continue our opposition. State monies which might support this project are far better spent fostering racial integration, not more segregation.

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8. We also point out that the City does not yet have in place as much as an LDA on the Grassy Sprain site, though School 15 has now been open for a full school year. A prior court order required the city not to open this new school until it had completed the replacement housing. That housing remains a figment of someone's imagination, while the school has opened. The Yonkers Green project is similar — we believe it will be erected, providing new subsidized housing in southwest Yonkers before one fifth its projected number of units are provided in new construction outside southwest Yonkers. This would make further mockery of the court's housing desegregation orders.

9. New construction continues to proceed at worse than a snail's pace. At our last meeting [ten days ago], the City reported that the Yonkers Avenue developer has not yet completed (and may not have started) architectural drawings, a process the Monitor estimated would take 3-4 months. Hoover Road is nowhere. I have commented above on Grassy Sprain. The City is now re-assigning Mr. Pinto, who has been in charge of new construction, to the Yonkers waterfront project. Who will lead the new construction effort is not clear, but its priority [none] has been clear for a very long time. Again, much more aggressive court intervention is needed.

10. In recent weeks, I have met with representatives from Ginsberg Development Corporation. The City made a submission on behalf of that company in February 1999, but the proposal before the court has been superseded as follows: Ginsberg is now prepared to build a 262 unit 80/20 rental building on upper Warburton Avenue (NW Yonkers); 52 of the rental units would be for priority one families earning

50% or less of median income. This building [and a companion, equally sized market rate building next door] would provide much needed rental housing for such families outside of southwest Yonkers. The problem is that the city is poised to pass new zoning legislation which very likely would subject this proposal to very lengthy delays, the need for site plan approval [not currently part of Yonkers zoning code] and SEQRA, which would delay construction for an estimated two-three years. The NAACP believes the city should allow this as of right project to go forward now, represent to the relevant state housing finance agency its support of the 80/20 project and affirmatively project support for this important mixed income project. By so doing, the City would show good faith and balance the continued concentration of rental opportunities [under other state programs] being created as we speak in southwest Yonkers.

11. Finally, the court has suggested in court and in an April conference call that the City might get more than one credit for placing priority one families in integrated housing. In light of the misuse to date of the existing housing program, the ease with which the city can develop a feasible rental program to meet the need of the bulk of priority 1 families, the tremendous need amongst those families for some benefit from this long delayed remedy and the diminution already granted the City from the original 800 unit remedy order, we oppose any such credit plus plan.

We appreciate the opportunity to set forth these views and stand ready for any further proceedings the court deems warranted.

Appendix 21

Respectfully submitted,

s/ Michael H. Sussman
MICHAEL H. SUSSMAN

cc: Mr. Fitzpatrick
Ms. Houk
Ms. Melkonian
Mr. Buddington
Mr. Jacoby
(all by FAX)

APPENDIX 22 — LETTER FROM DIANE L. HOUK TO HONORABLE LEONARD B. SAND RE EXISTING HOUSING ISSUES DATED JUNE 21, 1999

U.S. Department of Justice
Civil Rights Division

Housing and Civil Enforcement Section
P.O. Box 65998
Washington, DC 20035-5998

BLL:JAM:BFH:DLH:bw:eb
DJ 169-51-22

JUN 21 1999

SENT BY FEDERAL EXPRESS

Honorable Leonard B. Sand
Southern District Court of New York
500 Pearl Street
New York, New York, 10007

Re: United States et al. v. Yonkers Bd. of Education et al.
Case No. 80-CIV-6761 (LBS)

Dear Judge Sand:

The City of Yonkers requests an additional 42 credits for existing housing opportunities provided during Year II of the SSLTPO. One (1) of the credits requested by the City is not opposed by the United States and should be granted. Eleven (11) of the requested credits are for units sold through the YCAP program. The United States objects to the City

receiving any credits for YCAP moves for the reasons discussed below. The United States also opposes the City receiving the remaining thirty-one (31) credits it is requesting because the moves did not further the integrative purposes of the order.

YCAP Units

The United States objects to the City of Yonkers receiving any credit in Year II for units sold through the YCAP program. According to the most recent chart prepared by Ms. Melkonian's office, this is a total of eleven (11) credits. Out of the eleven, the Court Monitor has not received copies of mortgages for three of the properties and has not received household income data for an additional property. Thus, the City has not provided the Court Monitor with sufficient documentation supporting its request for credits for four of the purchases (3 ½ credits).

More importantly, the United States objects to the City's total request for credits for YCAP units because the YCAP program does not utilize the LTPO priority system. Last year, the United States informed the City that it would not object to its request for Year I credits for YCAP units with the understanding that the YCAP program would adopt the affordability restriction and LTPO priority system in future years. During Year II, YCAP included a 30-year affordability restriction in its mortgages, but did not institute the LTPO priority system. Consequently, none of the YCAP buyers in Year II were Priority 1 households.

Appendix 22

Remaining Disputed Credits

During the February 24, 1999 hearing regarding the City's request for Year II credits, the NAACP opposed the City's request for credits for moves made by non-minority buyers to predominantly white neighborhoods outside of Southwest Yonkers (29 credits) and for moves by minority buyers to the Runyon Heights neighborhood (2 credits). The United States joins with the NAACP in expressing its concern that these moves fail to further the integrative purposes of the LTPO as required by Paragraph 6 of the SSLTPO. Homes purchased by minority households in predominantly minority areas and homes purchased by white households in predominantly white areas simply do not further the remedial goal in this case of housing integration.

Furthermore, the United States has been concerned that housing opportunities are not being made available by the City to Priority 1 households as envisioned by the Court's remedial orders in this case and that this factor has contributed to the increasing number of non-integrative moves. Only seven Priority 1 households purchased existing homes between February and December 1998. In part, the low number of Priority 1 households that purchased existing homes in 1998 appears to be a reflection of the small number of Priority 1 applicants who were financially ready to become homeowners. However, during Years I and II, the City did not aggressively market the existing housing program to potential Priority 1 applicants. Since February 1999, the parties have been discussing ways in which the City can improve its outreach efforts and develop a rental program for Priority 1 households. The City adopted a Cross Street

marketing plan with outreach to Priority 1 households which appears to have been successful. We look forward to reviewing and commenting on the City's formal proposals for outreach and a rental program this week.

In light of the Court's recent request of the City, we anticipate court ordered changes in the existing housing program to better serve Priority 1 households. This will strengthen the City's ability to provide existing housing opportunities in a manner which furthers the integrative purposes of the remedial orders in this case. Given this, and in recognition of the City's general efforts during Year II to provide affordable housing opportunities, the United States suggests that the City should receive half-credit or 15 ½ credits for the remaining credits in dispute.

Sincerely,

s/ Diane L. Houk
Diane L. Houk
Senior Trial Attorney
Housing and Civil Enforcement Section

cc: Marilyn Melkonian, Esq.
Laura Lazarus
Raymond Fitzpatrick, Esq.
Michael Sussman, Esq.
Steve Jacoby, Esq.

APPENDIX 23 — MEMORANDUM FROM RAYMOND P. FITZPATRICK, JR. DATED JUNE 22, 1999 WITH PROPOSED RENTAL AND OUTREACH PROGRAM OUTLINES

LAW OFFICES OF
FITZPATRICK, COOPER & CLARK
FARLEY BUILDING, SUITE 600
1929 THIRD AVENUE NORTH
BIRMINGHAM, ALABAMA 35203

* * *

MEMORANDUM

TO: Marilyn Melkonian, Esq., Housing Monitor
Laura O. Lazarus, Esq.
Diane L. Houk, Esq.
Michael H. Sussman, Esq.
Stephen M. Jacoby, Esq.

FROM: Raymond P. Fitzpatrick, Jr.

DATE: June 22, 1999

SUBJECT: *U. S. v. Yonkers*

Pursuant to the provisions of the June 1, 1999 Order, enclosed please find the City's proposed rental and outreach program outlines.

The City's submission concerning disputed credits and other matters has been served under separate cover.

Appendix 23

s/ Raymond P. Fitzpatrick, Jr.

RPFJr/deb

cc: Mayor John D. Spencer
Commissioner Greg Arcaro, YAHD
Rose Noonan, Esq.

Appendix 23

6/21/99

Proposed Rental Housing Program

Background

According to the 1990 census, there are 40,710 units in Yonkers with 20,850 rental units in areas outside of the Southwest quadrant — 9567 in the Southeast quadrant; 7417 in the Northeast quadrant; and 3866 in the Northwest quadrant. The following demonstrates that the rents vary dramatically in Yonkers, requiring a several pronged approach to increasing rental housing opportunities for Priority 1 applicants. (A factor that substantially affects rent levels is the Emergency Tenant Protection Act which regulates rents in apartments with six or more units built prior to 1974.)

According to a 1998 rental analysis conducted by Westchester Residential Opportunities, a not-for-profit organization fair housing organization, and accepted by Westchester County Planning Department as a source of rental information, the average rents in Yonkers are as follows:

- $644 for a studio
- $712 for a one bedroom unit
- $866 for a two bedroom unit
- $1029 for a three bedroom unit

Rent ranges for investor owned properties listed for sale on the Multiple Listing Service as of June 8, 1999 are as follows (See Attachment A):

Appendix 23

- $550 – $750 for a one bedroom apartment
- $650 – $1100 with most at $850 for a two bedroom apartment
- $850 – $1400 for a three bedroom apartment

A sample of rents in nine non-luxury privately owned multifamily buildings (See Attachment B) owned by the same organization shows the following average rents:

- $719 for a one bedroom apartment
- $719 for a two bedroom apartment
- $1074 for a three bedroom apartment

Market rents in Riverhill Towers, a 262 unit apartment building located on Wayburton Avenue and advertised as a "luxury" building, has the following market rents:

- $1044 to $1156 for a studio
- $1384 to $1480 for a small one bedroom
- $1456 to $1521 for a medium one bedroom
- $1464 to $1593 for a large one bedroom
- $1754 to $1893 for a small two bedroom
- $1968 to $2068 for a large two bedroom unit

The market rents at Parkledge, which is located on Yonkers Avenue at the Saw Mill River Parkway and owned by the same firm as Riverhill Towers, are as follows (Parkledge is an assisted housing developments. Assisted tenants pay a base rent as compared to a market rent):

- $645 to $703 for a one bedroom unit
- $791 for a two bedroom unit
- $899 – $927 for a three bedroom unit
- $1047 for a four bedroom unit

Proposals

In order to increase rental housing opportunities for households who lived in public housing or assisted housing in Yonkers at any time since 1971, the City of Yonkers will develop and implement several programs which will make available approximately 20 rental units per year outside of Southwest Yonkers for LTPO qualified households.

1. *Home Purchase Assistance Program — 2-4 Family Homes*

LTPO households will receive downpayment and/or closing cost assistance to purchase two to four family residences in areas outside Southwest Yonkers. As a condition of the assistance, these households will be required to lease the rental units to LTPO households on a priority basis to those who have lived in public or assisted housing in Yonkers at any time since 1971. The rental units must be vacant at the time of the offer or documentation must be provided that the tenant is not involuntarily displaced. The following occupancy and rents will be required and incorporated into the security agreements with the owners:

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Purchaser's Income (% of median)	Tenant's Income (% of median)	Initial Monthly Rent*
0-50%	Up to 100%	1 Bed $1300 2 Bed $1617 3 Bed $1797
50-80%	0-50%	1 Bed $559 2 Bed $629 3 Bed $755
80-100%	0-50%	1 Bed $559 2 Bed $629 3 Bed $755

* Or the market rent, whichever is less. Rents will be adjusted by tenant paid utilities in accordance with a HUD Utility Allowance Schedule. The $559 tent is pegged at a level affordable to a one person household with an income at 35% of the median; the $629 to a three person household with an income at 35% of the median; and $755 to a five person household with an income at 35% of the median. The high rents, i.e., for applicants whose incomes are up to 100% of median, are affordable as follows: $1300 to a one or two person household with an income of $52,000; $1617 to a three or four person household with an income of $64,680; and the $1797 to a five+ household with an income of $71,880. These rents are pegged so that a substantial number of households in the particular income category can afford the rents.

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Tenants will pay no more than 30% of their monthly income for rent. In determining the amount of assistance to the LTPO purchaser, the City will take into account the projected rents so that the rents are affordable and the owner's housing expense does not exceed 33% of his/her household income.

Initial rents will change each year based on the change in median incomes for Westchester County as published by the U.S. Department of Housing and Urban Development (HUD). The owner will be permitted to adjust rents annually based on the percentage change in median income. The purchasers will be required to enter into leases with qualified tenants for a 30 year period.

2. *Lease-to-Purchase*

Through relationships with brokers, sponsors, and owners, the City of Yonkers will identify units that are available for lease to purchase, These include 1 to 4 unit buildings, condominium units and cooperative units. At the same time, the City of Yonkers will identify LTPO households who presently are only able to rent but who are interested in and could potentially qualify to purchase a home in the foreseeable future.

Interested LTPO applicants would be enrolled in a lease-to-purchase counseling program. The counseling program would include evaluating the advantages and disadvantages of a lease-to-purchase arrangement, the rights and obligations of the lessor/seller and lessee/purchaser, and structuring a lease-to-purchase to assure banks' down payment requirements are met, etc.

Appendix 23

The financial assistance would be structured to buy down the rent to an affordable level for the period of the lease, presumably one to three years. Additional assistance to purchase the unit would be provided to the LTPO applicant if needed to purchase the unit in accordance with the existing Home Purchase Assistance Program.

3. *Rental Buydown Program*

The Rental Buydown Program will provide a financial incentive to owners of rental housing in Yonkers outside the Southwest who agree to lease to LTPO qualified households on a priority basis to those who have lived in public or assisted housing in Yonkers at any time since 1971.

The City of Yonkers will provide a one time payment to owners who agree to lease to LTPO qualified households for a 10 year period. The amount of the financial assistance will be based on a discounted difference between a "Yonkers Fair Rent Standard" (as determined through a rent study) and a rent affordable to a household with an income at a percentage of the area median income.

The following chart illustrates how the program would work based on different income assumptions for a four person household with a Yonkers Fair Rent Standard of $1200 for a three bedroom unit:

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% of Median Income	35%	50%	60%
Household Income	$27,965	$39,950	$47,940
Market Rent	1,200	1,200	1,200
Affordable Rent	699	999	1,199
Tenant Paid Utilities	(31)	(31)	(31)
Net Rent To Owner	668	968	1,168
Rent Differential	532	232	33
One Year Subsidy	6,383	2,797	390
Subsidy Over 10 Years	63,825	27,870	3,900
Discounted Upfront Payment	43,150	18,850	2,640

For rental properties in need of repair or rehabilitation, the City of Yonkers will provide rehabilitation loans to participating owners on terms and conditions that establish the affordability of one or more units for LTPO qualified households with household incomes at a certain percentage of the area median income in return for their agreement to rent one or more units to LTPO qualified households on a priority basis for 10 years.

As with the Purchase Assistance Program, the owner will be permitted to adjust rents annually based on the percentage change in median income. Owners must agree to comply with certain property standards. If the owner fails to adhere to these property standards, the tenant may withhold rent and make the necessary repairs without retaliatory eviction. Participating owners will be required to register their rents with the NYS Division of Housing & Community Renewal as they are required in ETPA regulated properties. The units will be covenanted with a 10 year rental requirement.

Appendix 23

4. *Section 8 Rental Assistance*

The City of Yonkers has explored the possibility of using Section 8 Certificates or Housing Vouchers as a component of its Rental Housing Program. The City will administer a Section 8 Program in conjunction with the Rental Housing Program if additional Section 8 Certificates or Housing Vouchers can be obtained through HUD or an administering agency such as the NYS Division of Housing & Community Renewal.

According to the Municipal Housing Authority, there are no certificates or vouchers under its control at this time that could be set aside for a City of Yonkers Rental Housing Program. MHA has a waiting list of 3,000-4,000 people. When certificates or vouchers become available through turnover, these are directed to households on an emergency waiting list, e.g., for homeless families, relocatees, and others with special needs. The emergency waiting list currently numbers approximately 400. Additional certificates or vouchers from HUD are tied to specialized programs such as Welfare to Work and disabled populations.

MHA's Executive Director explored the possibility of securing additional certificates or vouchers for a mobility program with the HUD New York Office. He was informed that no such funding is available. He also advised that there are 67 households who are residing in assisted housing in Yonkers and who have Section 8 certificates. The City will explore whether these households are potential participants in the Rental Housing Program.

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At this time, a Rental Assistance Program supported by Section 8 Certificates or Housing Vouchers is not feasible unless additional Section 8 Certificates or Housing Vouchers are made available from HUD or another administering agency.

Administration

The Rental Housing Program will be administered by the City of Yonkers. It will include the following components:

- **Outreach** — Through workshops and mailings to owners of rental housing, managers, and brokers, the City of Yonkers will identify owners of rental housing who wish to participate in one or more components of the program.

- **Rental Counseling** — The City of Yonkers will continue to assess whether LTPO applicants are interested in rental or home ownership opportunities or both. LTPO applicants will be counseled on landlord and tenant rights and responsibilities; on the opportunities for rental housing in the target area; etc.

- **Property Condition** — The City of Yonkers will be responsible for assuring that the rental properties have valid certificates of occupancy and meet the property standards of the City of Yonkers Housing Code. The properties will be inspected annually and upon tenant complaint.

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- **Rent-Ups and Vacancies** — The City of Yonkers will maintain a list of LTPO applicants interested in rental housing. As units are available, the City of Yonkers will refer reason in writing. If the reason is acceptable, the City of Yonkers will refer another household.

- **Overall Monitoring** — The City of Yonkers will be responsible for reports, on-going outreach, coordination of property inspections, monitoring increases in rents and occupancy, etc.

Appendix 23

ATTACHMENT A

These are investor owned properties located outside of Southwest Yonkers on the Multiple Listing Services as of June 8, 1999. This list is demonstrative of rent levels in the target area.

- 51 Glen Road — 2 two bedroom apartments @ $850 each
- 150 Stone Avenue — 2 three bedroom apartments @ $850 and $900
- 9 Lincoln Terrace — 3 units including a one bedroom @ $625; a three bedroom @ $950 and a three bedroom duplex @ $1275
- 67 Alexander Ave — 2 units including a two bedroom @ $850 and a two bedroom @ $900
- 36 Troy — one bedroom @ $750
- 141 Crescent Place — two two bedrooms, one @ $690 and the other at $700
- 36 Lockwood — two units with one bedroom @ $650 and three bedroom @ $1300
- 14 Ball — two units with two bedrooms @ $900 each
- 238 Sommerville — two units with two bedrooms @ $875 and $825
- 199 Lake — two units with a one bedroom @ $550 and a two bedroom at $650
- 224 Sommerville — three units with two two bedrooms at $795 and a 3 bedroom @ $820
- 13 Burhans — three two bedroom units renting at $590, $775, and $760
- 217 Edwards — three units including a one bedroom studio at $550; 2 bedrooms at $750; and three bedrooms at $900

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- 122 Loomis — three units with a 2 bedroom duplex at $998; two bedroom at $1020, and a three bedroom at $1092
- 1 Lowell Street — two units with two bedrooms renting at $1000 each
- 200 Thurton Place — three units with a three bedroom apartment renting at $1100 and two one bedrooms renting at $650
- 149 Mile Square Road — two units with a three bedroom apartment renting at $1100 and a one bedroom at $650
- 106 Hyatt with two two bedroom units renting at $980
- 137 Morningside Place with six units with two three bedroom units renting at $1100, two three bedroom units renting at $900, and one three bedroom units renting at $1000
- 119 Wakefield Avenue with a three bedroom renting at $1125 and another three bedroom renting at $1015
- 12 Gavin Street with a two bedroom renting at $1100, a one bedroom at $600, and a one bedroom at $550
- 37 Theresa Avenue with a three bedroom apartment renting at $1400 and a four bedroom apartment renting at $1400

Appendix 23

ATTACHMENT B

Rents at 615 Warburton Avenue (Chester Buckingham), with 65 rental units, are as follows:

- $484 – $896 for a one bedroom apartment (3.5 rooms) with the average rent at $714
- $487 – $1270 for a two bedroom apartment (4.5 rooms) with the average rent at $811

Rents at 679 Warburton Avenue (Chester Hudson Courts), with 29 rental units, are as follows:

- $650 – $775 for a studio
- $386 – $941 for a one bedroom apartment (3.5 rooms) with the average rent at $722
- $530 – $1200 for a two bedroom apartment (3.5 rooms) with the average rent at $852
- $732 – $1174 for a three bedroom apartment (5.5 rooms) with the average rent at $953

Rents at 709 Warburton Avenue (Chester Hudson Courts), with 29 rental units, are as follows:

- $427 – $750 for a studio
- $469 – $892 for a one bedroom apartment (3.5 rooms) with the average rent at $701
- $580 – $1037 for a two bedroom apartment (4.5 rooms) with the average rent at $749
- $1250 for a three bedroom apartment (5.5 rooms)

Appendix 23

Rents at 765 Bronx River Road (Chester Park Courts), with 27 rental units, are as follows:

- $482 – $852 for a one bedroom apartment (3.5 rooms) with the average rent $710
- $495 – $989 for a two bedroom apartment (4.5 rooms) with the average rent at $638

Rents at 755 Bronx River Road (Chester Park Courts), with 24 rental units, are as follows:

- $410 – $892 for a one bedroom apartment (3.5 rooms) with the average rent at $695
- $425 – $983 for a two bedroom apartment (5.5 rooms) with the average rent at $584

Rents at 76 DeHaven Drive (Chester Tutor Woods) with six rental units are as follows:

- $485 – $1000 for a one bedroom apartment (3.5 rooms) with the average rent at $708

Rents at 98 DeHaven Drive (Chester Tutor Woods) with five rental units are as follows:

- $505 for a studio
- $508 – $918 for a one bedroom apartment (3.5 rooms) with the average rent at $622

Appendix 23

Rents at 380 North Broadway (Chester Westwater) with 12 rental units are as follows:

- $623 – $866 for a one bedroom apartment (3.5 rooms) with an average rent of $754
- $472 – $1050 for a two bedroom apartment (4.5 rooms) with an average rent of $696
- $856 – $935 for a three bedroom apartment (5.5 rooms) with an average rent of $897

In the Chester group of properties, the average rents of non-regulated one bedroom apartments is $770; for two bedrooms, $1058.

APPENDIX 24 — LETTER FROM DIANE L. HOUK TO HONORABLE LEONARD B. SAND RE CITY OF YONKERS' OUTREACH PROGRAMS DATED JULY 1, 1999

U.S. Department of Justice
Civil Rights Division

Housing and Civil Enforcement Section
P.O. Box 65998
Washington, DC 20035-5998

BLL:JAM:BFH:DLH:bw
DJ 169-51-22

JUL 1 1999

SENT BY FEDERAL EXPRESS

Honorable Leonard B. Sand
Southern District Court of New York
500 Pearl Street
New York, New York, 10007

Re: United States et al. v. Yonkers Bd. of Education et al.
Case No. 80-CIV-6761 (LBS)

Dear Judge Sand:

The United States provides the following comments regarding the City of Yonkers' proposed outreach program, rental program and modification of the credit systems:

Appendix 24

Outreach Program

The United States has no objections to the City's proposed outreach program to reach Priority I households.

Rental Program

The proposed rental program has four components and five administrative policies which the United States supports with some modifications.

First, the City proposes a rent-up and vacancy policy of maintaining "a list of LTPO applicants interested in rental housing" and referring "appropriate size households to participating owners." This policy should also include a requirement that the City will maintain the list by Priority and within each Priority, on a first-come first-serve basis, as envisioned by Section 4(f) of the LTPO. Furthermore, the City should then refer potential tenants according to the list and in order of the priority system. For example, a Priority I family that was put on the list in May 1998 would be referred before a Priority I family put on the list in January 1999. All Priority I families would be referred before any Priority II or III families.

The United States agrees with the City's proposal that under the first rental program component, the 2-4 Family Home Purchase Assistance Program, buyers must agree to lease the rental units to LTPO households on a priority basis with first priority given to those who have lived in public or assisted housing in Yonkers at any time since 1971. Under

this program, the buyers would not be limited solely to Priority I buyers, but the City would refer interested Priority I tenants prior to referring interested Priority II or III tenants.

However, the second and third program components, Lease-to-Purchase and Rental Buydown Programs, should be limited to Priority I households. The reason for this limitation would be to better serve Priority I households who, until now, have been under-served by the SSLTPO existing housing program even though these households are the very ones injured by the City's past discriminatory public housing siting practices.

The fourth rental program component proposed by the City is a Section 8 Rental Assistance Program. The United States strongly supports such a program and asks the Court to require the City to explore the development of such a program further with the New York State Division of Housing and Community Renewal and the United States Department of Housing and Urban Development (HUD) within the next ninety (90) days. At the end of this time period, the City should report back to the Court on the progress it has made in developing such a program and on specific impediments, if any, to its implementation. The United States Department of Justice will work with the City to support its request to HUD for Section 8 certificates or vouchers as long as the rental assistance will be made available only to Priority I households. The United States suggests that a total of 150 certificates or vouchers would be sufficient.

Appendix 24

The United States recognizes that it may be difficult to find landlords who will agree to lease apartments at an affordable rate for 30 years. Furthermore, the cost of a 30-year subsidy, even discounted for an "upfront payment," may be prohibitive. Thus, the United states does not object to using a ten (10) year affordability requirement for the Rental Buydown Program and the Section 8 Rental Assistance Program.

Credit System

The United States asks the Court not to change the credit system at this time. Changes such as those proposed by the City would have the effect of reducing the total number of housing opportunities to be provided and thus, provide less of a remedy than was envisioned by the SSLTPO. Furthermore, the City has given no good reason for changing the credit system at this time. It claims that it should receive double credits for Priority I households because of the delays in its program caused by having to do more outreach and develop a rental program. However, these are tasks that the City should have undertaken, and that the plaintiffs requested, immediately following entry of the SSLTPO. Any delays have been caused by the City's refusal until now to create an existing housing program tailored to meet the needs of Priority I families. The City should not now benefit from its own failure to act by being given double credits for doing what it needed to do all along. While we recognize that it may take the City longer than six years to reach the goal of 600 housing opportunities, we see no basis for reducing the goal further.

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The United states also opposes the city's proposal to limit full credits to moves to areas outside of Southwest Yonkers with less than a 45% minority population. Such a policy would apply to minority and nonminority families equally and would serve, in practice, to further concentrate all moves into predominantly white areas. Consequently, nonminority families would not be able to obtain a subsidy to move to any integrated or predominantly black neighborhoods even though such moves would promote residential integration in Yonkers. The City's proposal to receive only ½ credit for moves to areas outside of Southwest Yonkers with a greater than 45% minority population is also problematic because again it would apply equally to minority and nonminority families and thus, would not have an integrative effect.

Monthly Reporting Requirements

In order for the Court Monitor and parties to evaluate whether the anticipated changes in outreach and implementation of a rental program are having an integrative effect on residential housing patterns in Yonkers, it is important that the City include in its monthly reports information on the race of the buyers. Such reporting is routinely ordered by courts in housing discrimination cases. *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221, 230 (5th Cir. 1971); *Cabrera v. Fischler*, 814 F. Supp. 269, 284 (E.D.N.Y. 1993) *Roberts v. 66-36 Yellowstone Blvd. Co-op*, 599 F. Supp. 79, 87 (E.D.N.Y. 1984); *United States v. Housing Authority of City of Chickasaw*, 504 F. Supp. 716, 735 (S.D. Ala. 1980). Thus, we ask the Court to specifically include such a requirement in its order.

Sincerely,

s/ Diane L. Houk
Diane L. Houk
Senior Trial Attorney
Housing and Civil Enforcement Section

cc: Marilyn Melkonian
Raymond Fitzpatrick
Michael Sussman
Steve Jacoby
Laura Lazarus

APPENDIX 25 — LETTER FROM MICHAEL H. SUSSMAN TO HONORABLE LEONARD B. SAND RE CITY OF YONKERS' PROPOSED OUTREACH PROGRAM DATED JULY 2, 1999

LAW OFFICES OF MICHAEL H. SUSSMAN
ATTORNEYS AT LAW

MAILING ADDRESS
25 MAIN STREET
GOSHEN, NEW YORK 10924
(914) 294-3991
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* * *

July 2, 1999 — By fax to all

Honorable Leonard B. Sand
United States District Court
500 Pearl Street
New York, NY 10007

re: United States, et al v. YBE, et al, 80 CIV-6761 (LBS)

Dear Judge Sand,

The NAACP has reviewed the City's submissions dealing with rental programs, outreach efforts and credit issues. We also have Ms. Houk's letter dated July 1, 1999, the contents of which we endorse and will not repeat. I have the following additional comments on behalf of the NAACP:

Appendix 25

1. The outreach program must now make clear the existence of rental subsidies. This is not accomplished by a slogan, "Are you tired of paying rent". This kind of slogan does not assist families who may be tired of paying rent, but are not qualified for purchase programs and is insensitive to their needs.

2. We disagree with the goal of 20 rental opportunities/year aimed at Priority 1 families. The available data shows that during the first 30 months of implementation, the City has provided between 130-140 credit-worthy housing opportunities (about 55% of the number which by now should have been provided under the 100 unit/year schedule). Progress this year after the NAACP pointed out the lack of address to the housing needs of priority one households has been particularly minimal, demonstrating that the city's prior program was not focused on such families, as it ought to have been. Moreover, only about 15% of the total housing opportunities (about 22) have gone to Priority One families. Moreover, it is not seriously disputed that inherent, structural problems constrain the efficacy of the purchase only program for Priority One households, the vast number of whom remain rentors. Accordingly, we believe that a goal of 60 rental units/ year for the next four years [or a total of 240 units] should be set. This would mean that by the completion of implementation about 50% of housing opportunities will have been made available to the victims of the adjusted segregative practices, defined as priority one families; while the NAACP is not satisfied with this proportion, we can accept it. At this point, it is plain that the city's proposed allocation for rental housing is simply inadequate and not tailored to the underlying violation or calculated to remedy it. I note that the United States has proposed 150 section 8

certificates/vouchers which is consistent with our proposal [since the section 8 program would be one of several aimed at increasing the stock of rental housing.]

3. The definition of the areas in which rental housing will be provided needs to be more precisely tailored to the demographics of today's Yonkers. For instance, Runyon Heights should not be acceptable area for any of the city's rental assistance programs. The area of near northwest Yonkers, south of Shonnard Terrace, is likewise currently desegregated and the city should not be subsidizing black families to move to these blocks.

4. Under the proposed lease to purchase program, the city states that it will "buy down the rent to an affordable level for the period of the lease" presumably one to three years. To my knowledge, most of the relevant leases are for one year and this is generally not of sufficient length to make efficacious a lease to purchase program. More flexibility needs to be incorporated into this program to make it feasible.

Thank you for your consideration of our views.

Yours sincerely,

s/ Michael H. Sussman
Michael H. Sussman

cc: Ms. Melkonian/Ms. Lazarus
Mr. Fitzpatrick
Ms. Houk
Mr. Jacoby
Mr. Buddington

APPENDIX 26 — LETTER FROM RAYMOND P. FITZPATRICK, JR. TO HON. LEONARD B. SAND RE DOJ AND NAACP COMMENTS CONCERNING OUTREACH PROGRAM DATED JULY 2, 1999

LAW OFFICES OF
FITZPATRICK, COOPER & CLARK
FARLEY BUILDING, SUITE 600
1929 THIRD AVENUE NORTH
BIRMINGHAM, ALABAMA 35203

* * *

July 2, 1999

VIA FACSIMILE
and FIRST CLASS MAIL

Hon. Leonard B. Sand
Southern District of New York
500 Pearl Street
Rm. 1630
New York, New York 10007

Re: *United States v. Yonkers*

Dear Judge Sand:

I am in receipt of correspondence from Ms. Houk to the Court dated July 1, 1999, and Mr. Sussman to the Court dated July 2, 1999.

Most of the plaintiffs' comments address the City's proposed outreach and rental program. The Court's order of

June 1, 1999, directed the City to distribute drafts of those programs through the monitoring process by June 22, 1999, directed the plaintiffs to respond through the monitoring process and directed the parties to seek resolution of these matters at a monitoring meeting. For that reason, the City did not submit its first draft of the program to the Court. We are confident that the matters raised by the plaintiffs can be resolved through the monitoring process at our next meeting on July 14, 1999. That is the process directed by the June 1 order.

Ms. Houk also objects to the City's proposal for double credit on Priority 1 families. Our proposal is consistent with the Court's suggestion on February 24 and the realities of the level of assistance needed to successfully place Priority 1 families.

We are surprised that the United States objects to the City's proposal to better define those parts of Yonkers that are the target area that meet the integrative purposes of the LTPO. The City's proposal eliminates census blocks of minority concentration from full credit transactions and treats those areas in the same manner that the LTPO treats Southwest Yonkers.

Thank you for your consideration of these comments.

Yours very truly,

s/ Raymond P. Fitzpatrick, Jr.
Raymond P. Fitzpatrick, Jr.

RPFjr/dr

cc: Michael H. Sussman, Esq.
Diane L. Houk, Esq.
Stephen M. Jacoby, Esq.
Marilyn Melkonian, Esq.
Laura O. Lazarus, Esq.

DICTATED BUT NOT READ

APPENDIX 27 — MEMORANDUM FROM MARILYN MELKONIAN TO HONORABLE LEONARD B. SAND RE SEVERAL ISSUES AND PROPOSALS TO EXISTING HOUSING PROGRAM DATED JULY 28, 1999

TELESIS CORPORATION

* * *

MEMORANDUM

via facsimile (212.805.0244)

TO: Honorable Leonard B. Sand

FROM: Marilyn Melkonian

RE: Summary of Issues and Proposals
80 Civ. 6761

DATE: July 28, 1999

CC: Raymond P. Fitzpatrick, Jr., Esq.
Diane Houk, Esq.
Stephen M. Jacoby, Esq.
Michael Sussman, Esq.

This memo summarizes the following issues, and also provides some proposals, relating to the Existing Housing Program:

- The Priority I Outreach Proposal
- The Rental Assistance Program
- The Award of Credits for Year 2
- The Future Award of Credits for the Existing Housing Program
- The Yonkers Green Project

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I. *The Priority I Outreach Program*

Summary of Issues:

On June 22, 1999, the City of Yonkers distributed a proposed outline for an outreach program to increase participation by Priority 1 households in the homeownership program. The Plaintiffs have expressed their approval of this program for use in connection with the homeownership program. The Plaintiffs noted that the proposed Priority 1 Outreach Program is not yet tailored for the Rental Assistance Program (described below). The Plaintiffs suggested that an appropriate outreach program be developed to inform Priority 1 applicants of the existence of rental subsidies. At the last Housing Monitor Meeting, the City of Yonkers expressed its willingness to develop an outreach program in connection with the Rental Assistance Program.

Proposal:

The City of Yonkers should implement the Priority 1 Outreach Program outlined on June 22, 1999 in connection with the Homeownership Program. The City should also develop an outreach program for the Rental Assistance Program within thirty (30) days.

II. *The Rental Assistance Program*

Summary of Issues:

The City of Yonkers distributed an outline of a proposed Rental Assistance Program on June 22, 1999. The City

is proposing a goal of twenty (20) rental units annually through this multi-faceted program. These units could not be located in Southwest Yonkers, as the boundaries are defined in the LTPO. The City's goal would be accomplished by providing the following types of assistance.

- *Home Purchase Assistance:* The City would assist households in acquiring 2-4 family homes, and those households would be required to rent to LTPO qualified households on a "Priority Basis." "*Priority Basis*" means that the City would be required to offer these units to qualified Priority 1 households, in the order of the priority system, before offering the units to any Priority 2 or 3 households. For example, a Priority 1 family that was put on the list in January 1999 would be referred before a Priority 2 family put on the list in May 1998. The home purchase assistance would also be provided to LTPO qualified households on a Priority basis.

- *Lease to Purchase:* The City would assist LTPO applicants in a lease-to-purchase transaction. Under the City's proposal, the assistance for these purchases would be available to all LTPO qualified households on a Priority Basis.

- *Rental Buydown:* The City would provide financial incentives to owners of rental housing willing to rent to LTPO qualified households. Under the City's proposal, the assistance for these purchases would be available to all LTPO qualified households on a

"priority basis."

- *Section 8:* The City believes there are no Section 8 certificates available, and therefore Section 8 could not be a component of the Rental Program.

In their written comments, the Plaintiffs support the first three programs, Home Purchase Assistance, Lease-to-Purchase and Rental Buydown. The Plaintiffs, however, would limit assistance for the Lease-to-Purchase and Rental Buydown programs to Priority I Households.

For these three programs, the United States noted that the City proposed a policy of maintaining "a list of LTPO applicants interested in rental housing" and referring "appropriate size households to participating owners." The United States said that the policy should also include a requirement that the City maintain the list by Priority and within each Priority, on a first-come first-serve basis. The City should then refer potential tenants according to the list and in order of the priority system.

The NAACP also noted that the rental units should not be provided in predominantly minority areas, such as Runyon Heights.

The Plaintiffs' position is that the City should take advantage of the Section 8 Program. The United States recommended that the City explore the possibility of obtaining Section 8 Certificates from the State and the Federal government for this purpose.

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The City of Yonkers' goal was to obtain 20 rental units annually. Both Plaintiffs noted that if Section 8 Certificates were used, the number of rental units provided could be significantly higher. The United States suggested a total goal of 150 Section 8 Certificates over the remaining life of the program. The NAACP suggested that the City obtain a total of 60 rental units annually, which would include Section 8 Certificates, for a total number of 240 rental units over the life of the program.

Proposal:

While an effective Rental Assistance Program should be implemented, the implementation remedy should remain essentially a homeownership program. To be effective, the Rental Assistance Program could be modified as described below.

The Home Purchase Assistance Program should be implemented as described by the City of Yonkers. The Lease to Purchase and the Rental Buydown Programs should be limited to Priority 1 households. The annual goal of these three programs should be 20 units of rental housing annually.

In addition, the rental housing should be made available in areas that are outside of Southwest Yonkers, as well as areas that do not exceed a 45% minority concentration, such as the area surrounding Runyon Heights (the "*Runyon Heights Area*"). The United States could prepare a map outlining the Runyon Heights Area and

any other possible areas with that description, which parties could then review and approve. Once the Runyon Heights Area and any other areas have been defined, they should be treated just as Southwest Yonkers is treated in the LTPO.

The City should explore further the development of a Section 8 Rental Assistance Program as this is still the best subsidy program for housing Priority 1 households outside of Southwest Yonkers. The City should discuss this possibility with the New York State Division of Housing and Community Renewal and the United States Department of Housing and Urban Development within the next ninety (90) days. The Housing Monitor and the United States should assist the City in this effort. If available, Section 8 certificates could supplement the Rental Assistance Program, thereby serving more Priority 1 families.

For all of these Rental Assistance Programs, the City's list of LTPO applicants interested in rental housing should be maintained by Priority and within each Priority, on a first-come first-serve basis. The City should then refer potential tenants according to the list and in order of the priority system.

III. *Existing Housing Credits for Year 2*

Overview:

As noted in your June 1, 1999 Order, the City of Yonkers requested a total of 85 credits for Year 2. The court

awarded 43 credits for Year 2, and 42 credits remain in dispute. Eleven (11) of these disputed credits are requested for units sold through the YCAP Program. The Plaintiffs opposed an additional thirty-one (31) credits because they claim that the moves did not further the integrative purposes of the SSLTPO.

- *YCAP Units:*

  Summary:

  The Yonkers Community Action Program, which is run under the City Community Development Department, administers the YCAP units. The parties acknowledge that the YCAP Program does not use the LTPO priority system/lists, even though the units were sold to LTPO qualified households. None of the YCAP buyers in Year 2 were Priority 1 households.

  Although disputed by the City, the Plaintiffs and the Housing Monitor believe that the City was informed last year that they did not oppose granting credits for YCAP units in Year 1 provided that the YCAP program adopt the affordability restriction *and* the LTPO priority system in future years. The LTPO priority system was not adopted in Year 2. However in Year 2, that YCAP program imposed a 30-year affordability restriction on the units, although the City failed to provide documentation for four of these purchase (3 1/2 credits).

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Proposal:

The City should not receive credits for the YCAP units obtained in Year 2, but if the YCAP program adopts the LTPO priority system, it would receive credit for units obtained through this program in the future.

Remaining Disputed Units:

Summary:

Both Plaintiffs opposed the City's request for full credits for moves made by non-minority buyers to predominantly white neighborhoods outside of Southwest Yonkers (29 credits) and for moves by minority buyers to the Runyon Heights neighborhood (2 credits).

The Plaintiffs expressed concern that these moves fail to further the integrative purposes of the LTPO as required by Paragraph 6 of the SSLTPO. As stated by the United States in its June 21, 1999 letter, "homes purchased by minority households in predominantly minority areas and homes purchased by white households in predominantly white areas simply do not further the remedial goal in this case of housing integration."

The United States also expressed concern that not enough housing opportunities are being made available to Priority 1 households, although implementing a Priority 1 Outreach Program should

help address that concern. Only seven Priority 1 households purchased existing homes between February and December, 1998.

In recognition of the proposed implementation of the Priority 1 Outreach Program and the Rental Housing Program, as well as an acknowledgment of the City's "general efforts during Year 2 to provide affordable housing opportunities," the United States suggested that the City receive half-credit or 15 1/2 credits for the remaining disputed credits. The NAACP opposed granting the City any credits for these units.

In its June 21, 1999 Report (Page 31), the City noted that if the Court adopts a proposal to identify appropriate locations based on the racial composition of the census block, the City would agree to take one-half credit for each of the two units located in Runyon Heights.

Proposal:

The Parties and the Monitor are aware that the impact of the Existing Housing Program could not be assessed until a significant number of housing placements had been made. After Year 2, when that data was available, and allowed the parties to express concerns about the implementation of the program, how it might be improved to ensure that it had the goal of furthering integration. Further, given that the City is: (1) implementing an outreach program for Priority 1 applicants (2) has prepared a proposal for

the Rental Housing Program, and (3) is operating an Existing Housing Program, the Housing Monitor recommends that the City receive a total amount of 30 additional credits for Year 2: one (1) credit for the two (2) Runyon Heights units, and the remaining twenty-nine (29) credits.

IV. *Future Implementation of Existing Housing Program*

Summary of Issues:

In its June 21, 1999 proposal, the City of Yonkers requested that beginning with Year 3, that the City receive two credits for all Priority 1 placements. Both Plaintiffs opposed the proposal to provide two credits for each Priority 1 placement. In its July 1, 1999 letter, the United States stated that "Changes such as those proposed by the City would have the effect of reducing the total number of housing opportunities to be provided and thus, provide less of a remedy than was envisioned by the SSLTPO."

The City of Yonkers also suggested that the target areas for the LTPO be revised to provide that the target area be those census blocks of east and northwest Yonkers with less than 45% minority residents. The United States opposed the revision of the target areas.

Proposal:

The Housing Monitor suggests that the City should receive two credits for each Priority 1 placement in

Year 3. In the following years, the City should receive one credit for each Priority 1 placement. However, the City should also obtain credits for Priority 2 and 3 households, provided that the City offers assistance on a Priority Basis, and that these moves further the integrative purposes of the order.

V. *Yonkers Green*

Summary of Issues:

The City of Yonkers has requested that the Court confirm that phase one of the proposed Yonkers Green project does not violate past injunctions of the Court. In its June 28, 1999 letter, the United States said that it would not support funding for Phase One of the Yonkers Green project unless the following two conditions are met:

- "The LTPO Priority system is not used by the developer when selling the homes at Yonkers Green so as to avoid limiting the housing choices of current or prior public and assisted housing residents to Southwest Yonkers, and

- The Yonkers Green developer adopts and implements an affirmative marketing campaign to inform and attract non-minority buyers to the development."

In its June 21, 1999 report, the City expressed a willingness to implement the two conditions set forth by the United States. The NAACP opposes the Yonkers Green project, and has stated that they believe "this

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project is segregative and should not be financed . . . we believe that affirmative marketing will not assist in integrating resulting units."

Proposal:

Phase One of the Yonkers Green Project should proceed with an emphasis on affirmative marketing as recommended by the United States.

M.M.

APPENDIX 28 — LETTER FROM MICHAEL H. SUSSMAN TO HONORABLE LEONARD B. SAND RE HOUSING MONITOR'S RECOMMENDATIONS DATED JULY 30, 1999

LAW OFFICES OF MICHAEL H. SUSSMAN
ATTORNEYS AT LAW

MAILING ADDRESS
25 MAIN STREET
GOSHEN, NEW YORK 10924
(914) 294-3991
TELECOPIER: (914) 294-1623

* * *

July 30, 1999

Honorable Leonard B. Sand
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

re: United States and Yonkers Branch, NAACP, et al. v. Yonkers Board of Education, et al., 80 CIV 6761 (LBS)

Dear Judge Sand,

On July 27, 1999, we received the Housing Monitor's recommendations on outstanding housing issues. As we disagree with a number of her recommendations, we offer these comments for Your Honor's consideration and respectfully request oral argument on the issues before settlement of any Order.

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1. The Monitor proposes a goal of 20 rental units for each of the remaining implementation years. This goal is too low and, we would suggest, seriously misconstrues remedial objectives. Priority One households represent the victims of the adjudicated housing discrimination in Yonkers. Accordingly, remedial efforts need to be tailored to them, not made as or more available to other potential beneficiaries. By analogy to EIP II, which the Court of Appeals panel found to be an impermissible broad school improvement program, the housing remedy cannot continue as a general program to subsidize whoever comes to the Fair Housing Implementation Department. The NAACP has so argued for years. The current housing remedy has demonstrably failed to meet the needs of priority one households for one primary reason: a homeownership program is not a remedy tailored to the violation, which exclusively involved rental housing. The victim class was comprised exclusively of renters and any remedy should have focused, as we have long asserted, on the provision of desegregated rental housing opportunities. Home ownership should have been a secondary option. Now, after years of attempting to make home ownership the primary thrust of the remedial effort, it is abundantly clear that only a very small proportion of Priority One families can qualify for this option. Less than 15% of housing opportunities made available since January 1997 have gone to priority one households. Put another way, 85% of the benefit has gone to persons never directly affected by the housing discrimination adjudicated in this case.

2. In this context, Ms. Melkonian's suggestion that a goal of 20 rental units/year be established is unacceptable and should be rejected. A much more ambitious goal is needed

to directly address the victims of discrimination and to balance the initial years of implementation which have favored white Priority 2 and 3 households, not the victims of discrimination. We have proposed an annual goal of 60 units and believe the Court should endorse that objective.

3. We strenuously object to the grant of 30 credits to the City for its fostering of segregative housing moves during year 2. The Monitor claims that the parties had not "assessed" the "impact of the Existing Housing Program" before the end of Year 2 and suggests that the City was not on notice that its program could not rightfully foster segregative moves. We reject both arguments, as should this Court. The remedial orders make plain that fostering racial integration was their principal purpose. This entire litigation is about racial segregation, nothing more and nothing less. A remedy must address this issue, nothing more and nothing less. The City cannot be permitted for political or ideological reasons to escape from this remedial imperative; nor can it rightfully be watered down by any source, including the Court. Adopting Ms. Melkonian's proposal would give the City credit for fostering moves which perpetuate segregation. This makes no logical sense and cannot be defended on any ground. To claim that the City did not know what it was doing is to insult the intelligence of City decision-makers. To claim the court orders provided insufficient guidance when they specifically announced their fundamental purpose — to promote integration — is to revise history and ignore the language. To claim that a remedy in a case like this cannot be race conscious is nonsense and borne of pure and simple ideology. This Court should not allow Yonkers credit for using scarce federal dollars in a segregative manner — that

is, by fostering moves by (a) white families from southwest Yonkers — the defined area of minority concentration — to other parts of the City; (b) minority families to Runyon Heights and (c) white families from one area of non-minority concentration to another similar area. None of these "moves" fosters the desegregative purpose of the Orders and none should have been supported by the City. That they were should not now be sanctioned or condoned in any way.

4. We equally strongly oppose granting the City more than one credit for any move. On the contrary, if anything, in light of the court's use of scarce federal dollars to support segregation, as explained above, the number of units ultimately included in this remedy should be expanded, not contracted, the effect of granting multiple credits/move. The City has failed in two and one-half years to assist an adequate number of Priority One families. It needs to redouble its efforts to do so. It needs otherwise to implement all aspects of its program in a manner which fosters desegregation, not segregation. Granting the City multiple credits/unit serves no remedial objective. The City should not need to be given additional "incentives" to comply with extant court orders. The parties' bargained for "bottom line", i.e., number of units to be created, cannot be altered by this Court without a showing of a significant change of circumstance. If anything, the only pertinent change of circumstance is the City's failure to timely provide victims with relief which would justify increasing the overall goal, not decreasing it, the practical effect at double credits. The Court should reject this proposal.

5. The State of New York has withheld provision of certain scarce subsidy dollars to the Yonkers Green project based

upon the state opposition of the NAACP. The proposed site is located in southwest Yonkers, next to Whitney Young, a 236 project, within several blocks of Parkledge and within one half mile of several thousand units of assisted housing. Since this court found liability in November 1985, no new construction of assisted [as opposed to public housing] has been commenced outside of southwest Yonkers. While there was a groundbreaking at Cross Street in June 1999, that project would deliver 13 units of subsidized housing. Little progress has been made for years at Hoover Road. In 1997, this Court gave Yonkers' permission to rebuild School 15, but specifically ordered that the building not be opened until the development of the East Grassy Sprain site for a comparable number of housing units. Today, the new School 15 is about to enter its second year of functioning, while the City and the selected developer have not even entered an LDA for East Grassy Sprain. In this context, to allow the provision of 40 units of new subsidized housing in Southwest Yonkers at this time is to perpetuate the notion that in that quadrant of Yonkers it is permissible to so proceed. Indeed, the signal which is sent is stronger — we will expedite projects like Yonkers Green while we allow the City to take its sweet time elsewhere in Yonkers on projects aimed at the same income range. The NAACP again strongly opposes this message and prays that this Court will not give its imprimatur to the furtherance of racial segregation.

6. While the United States argues that affirmative marketing may countervail the segregative impact of such a project, we know of no evidence of this and note that the area of minority concentration has spread in and around the Yonkers Green site, not been abated in recent years.

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We do not object to any of the Monitor's other suggestions and appreciate Your Honor's careful review of these matters.

Respectfully submitted,

s/ Michael H. Sussman
MICHAEL H. SUSSMAN

cc: Mr. Fitzpatrick, Ms. Houk, Mr. Jacoby, Ms. Melkonian, Mr. Buddington, Mr. Hayes

APPENDIX 29 — LETTER FROM DIANE L. HOUK TO HONORABLE LEONARD B. SAND RE HOUSING MONITOR'S RECOMMENDATIONS DATED JUNE 21, 1999

U.S. Department of Justice
Civil Rights Division

Housing and Civil Enforcement Section
P.O. Box 65998
Washington, DC 20035-5998

BLL:JAM:BFH:DLH:bw
DJ 169-51-22

AUG 4 1999

SENT BY FACSIMILE AND FIRST CLASS MAIL

Honorable Leonard B. Sand
Southern District Court of New York
500 Pearl Street
New York, New York 10007

Re: United States et al. v. Yonkers Bd. of Education et al.
Case No. 80-CIV-6761 (LBS)

Dear Judge Sand:

The Summary of Issues contained in the July 28, 1999 report from Marilyn Melkonian correctly states the United States' positions regarding the issues presently before the Court. Our position on each of these issues has not changed.

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In particular, we want to note our continuing opposition to modifying the credit system to give the City of Yonkers double credit for providing affordable housing opportunities to Priority 1 households. Since these are the very households who have been most harmed by the City's past discriminatory conduct, they should not receive less of a remedy because of delays by the City in providing them an adequate remedy. Permitting the City to obtain double credits would result in the provision of fewer than 600 actual housing opportunities and would reward the City for its own delay.

Finally, we wish to clarify the number of units being proposed as an annual goal for the City's rental programs. Ms. Melkonian's July 28th report describes the three rental programs endorsed by the City and proposes that the "annual goal of these three programs should be 20 units of rental housing annually." The United States believes that this is a realistic and acceptable annual goal for these three rental programs, if a Section 8 rental program is developed *in addition to* the three rental programs proposed by the City. The annual goal for a Section 8 program, if such a program can be developed, would be in addition to the 20-unit annual goal proposed by Ms. Melkonian. The United States is proposing an annual goal for Years Four, Five and Six of 50 Section 8 certificates or vouchers for a total of 150. This would be in addition to the 20 rental units per year provided by the City through its non-Section 8 rental programs. However, if the City is unable to obtain sufficient Section 8 certificates or vouchers from the State of New York or HUD before the end of this calendar year for use in the remaining three years of the SSLTPO, then it will be necessary to revisit the issue of how best to provide affordable housing opportunities to Priority 1 households.

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Sincerely,

s/ Diane L. Houk
Diane L. Houk
Senior Trial Attorney
Housing and Civil Enforcement
Section

cc: Marilyn Melkonian
Raymond Fitzpatrick
Michael Sussman
Steve Jacoby
Laura Lazarus

APPENDIX 30 — MEMORANDUM FROM LAURA O. LAZARUS RE JUDGE SAND'S TENTATIVE CONCLUSIONS AND CONFIRMATION OF MEETING DATED AUGUST 11, 1999

TELESIS CORPORATION

* * *

MEMORANDUM
August 11, 1999

via facsimile

TO: Michael Sussman, Esq. *(914.294.1623)*
Diane Houk, Esq. *(202.514.1116)*
Raymond Fitzpatrick, Esq. *(205.320.7444)*
Stephen Jacoby, Esq. *(212.416.6009)*

FROM: Laura O. Lazarus

SUBJECT: Judge Sand's Tentative Conclusions and Confirmation of Meeting on Monday, August 16, 1999 at 1:30 p.m.

This memo is to confirm that there will be a Housing Monitor meeting at 1:30 p.m. on Monday, August 16, 1999. The meeting will be held at Telesis's New York Office, 545 Madison Avenue (at 55th Street), 12th Floor, New York, New York. Attached please find an agenda for the meeting.

In addition, on the attached page, please find Judge Sand's tentative conclusions in response to the Housing Monitor's July 28, 1999 "Summary of Issues and Proposals" (the

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"*Summary*") and the submissions made by the City, NAACP and Department of Justice. Judge Sand has requested a telephone conference with the parties for additional comments at a time to be scheduled at Monday's meeting.

Please let me know if you have any questions.

L.O.L.

cc: Honorable Leonard B. Sand *(212.805.0244)*
Marilyn Melkonian *(202.338.1565)*

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MONITORING MEETING
AGENDA
August 16, 1999

Meeting to be held Monday, August 16, 1999 at 1:30 p.m. at Telisis's New York Office: 545 Madison Avenue (at 55th St.), 12th Floor New York, New York

I. NEW CONSTRUCTION

A. Cross Street

1. Update on Construction
2. Status of Architect
3. Marketing Update

B. Hoover Road

1. Site Plan Status
2. Application for County Infrastructure Funds
3. Status of Affordable Housing Trust Funding
4. LDA Status

C. East Grassy Sprain Road

1. Variances Required
2. Status of Affordable Housing Trust Funding
3. Review of Architectural Plans

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D. Yonkers Avenue

1. Status of Construction Drawings
2. Status of LDA
3. Proforma Status

II. EXISTING HOUSING

A. Schedule Telephone Conference
B. Section 8
C. Review City's Monthly Progress Report

III. OTHER MATTERS

A. Environmental Assessments

IV. SCHEDULE NEXT MEETING

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Judge Sand's Tentative Conclusions

Except as discussed below, the recommendations contained in the Summary are adopted.

I. *Existing Housing Credits*

The Court accepts the Summary recommendations as to existing housing credits on the condition and understanding that no future credits will be granted unless the housing opportunity created furthers the integrative goals which are the essence of all the Court's prior housing remedy orders intended to counter the effects of prior racial discrimination in housing. Future credits will *not* be allowed nor may AHTF funds be utilized for the creation of housing opportunities which do not further integrative goals (e.g. placement of a minority family in Runyon Heights). If the City has any questions whether a proposed placement will satisfy the criteria of the remedy orders, it may obtain pre-clearance from the Housing Monitor with input from the parties.

II. *Credits for Priority One Placements*

The City shall receive one credit for each Priority One Placement (hereinafter "*PIP*") in future years. If the City reaches its annual goal of PIP's (assumed 20) it shall receive a bonus of 50% (i.e. if a goal of 20 PIP's is reached, the bonus is 10 credits). If the PIP goal is exceeded, the City shall also receive 2 credits for each PIP placement in excess of the goal (i.e. if there are 24 PIP's, the City will receive a bonus of 12 credits plus 8 credits for the four PIP's in excess of the goal). If the PIP goal is not reached, the number of

credits will be diminished by the number of units in the shortfall. (If the goal is 20 PIP's, but only 17 occur in the year, the City will receive 14 credits) (20-17 = 3 : 17-3=14). If there are not at least 10 PIP's, the City will receive no credits for PIP placements.

III. *Section 8*

In addition to the housing activity and goals set forth in the Summary and herein, exploration of Section 8 opportunities shall continue and there shall be established a Section 8 category which shall have separate goals for PIP rental placements in addition to those otherwise set forth in the Summary and herein.

IV. *Yonkers Green*

The history of subsidized housing projects in southwest Yonkers is that they were initially conceived of as being integrative with affirmative marketing plans which proved unsuccessful and were later abandoned. The concern of the NAACP is therefore entirely understandable.

Yonkers Green may, however, go forward as proposed in the Summary with the following proviso:

> If it has not already done so, the developer is to submit a specific description of its proposed affirmative marketing plan, outlining among other things, the financial and personnel resources to be committed to such plan. Every 90 days after the marketing begins, the developer shall submit a

written report to the Housing Monitor and the parties setting forth the results to date of such marketing plan. The plan may not be discontinued, nor the resources devoted to it be diminished, until its goals are achieved or further written order of the Court. The Court sua sponte, or on the request of any party, may order that the developer increase or modify marketing efforts should it appear that the affirmative marketing plan is falling short of its goals.

V. *New Construction*

All new construction projects are to be in construction in 1999.

APPENDIX 31 — LETTER FROM MICHAEL H. SUSSMAN TO HONORABLE LEONARD B. SAND RE OUTSTANDING HOUSING ISSUES DATED AUGUST 18, 1999

LAW OFFICES OF MICHAEL H. SUSSMAN
ATTORNEYS AT LAW

MAILING ADDRESS
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* * *

August 18, 1999 — By fax to all

Honorable Leonard B. Sand
United States District Court
Southern District of New York
500 Pearl St.
New York, N.Y. 10007

re: Yonkers housing issues

Dear Judge Sand,

At last Monday's Monitor's meeting, the parties agreed that further written submissions might best inform Your Honor of their respective views on the Court's tentative determinations concerning outstanding housing issues. This letter sets out the NAACP's continuing concerns and

suggests that any substantial alteration of the remedial orders should follow an evidentiary proceeding at which all parties can make a record supporting their positions.

1. The court has proposed accepting the monitor's report and granting the city full credit for non-integrative moves by Caucasian families. As these constitute at least 35% of all subsidized moves to this date and as they do not forward the objectives of the remedial order, the NAACP continues to object to credit being granted for them. Moreover, the court's determination does not make clear that similar, future moves by white families are not to be credited, using, instead, as an example of a forbidden move, a minority family moving to Runyon Heights. It should be made crystal clear to Yonkers that both kinds of segregative moves cannot be fostered for program credit; indeed, both are precisely the kinds of government assisted moves which confirm segregative patterns.

2. We understand that the Court has rejected the NAACP position that multiple credits for priority one families are totally inappropriate and further dilute the remedial power of the Stipulated Order. In October 1996, the parties agreed upon the City creating housing opportunities for 600 families (100 for each of six years). Yonkers has not met this objective for either of the first two years and has provided 26 housing opportunities to date this year [including 10 for Caucasian families making segregative moves and three for minority families moving to Runyon Heights]; the Court has yet to order any compensatory effort to make up the difference and now, instead, absent the plaintiffs' consent, proposes a bonus system which has the potential for significantly diminishing

the total number of units which Yonkers must provide. We believe this constitutes an abuse of discretion and an impermissible alteration of the Stipulation. Moreover, when combined with the history of post October 1996 implementation, it is but another further degradation to the Court order. In this regard, I note the following: the City's existing housing program has failed to meet the needs of Priority 1 households, only three of whom have participated in the program this year, 1999; the City's new construction program has yielded not a single unit in three years and several projects remain far from commencement; replacement housing for School 15 lags while that re-built school enters its second year, quite contrary to the express language of the October 1996 order and, finally, the City's existing housing program has supported far more white families making segregative moves than Priority 1 families making integrative moves.

Had the City told the parties in October 1996 that this would represent the outcome three years hence, the Stipulation would never have been entered.

Now, the court is proposing what amounts to an award for the City's failures: further reduction in the total number of units to be provided through a very generous bonus system. No such system should be put into place and certainly one not even considered before the City fully implements its rental program. The court and parties should assess the efficacy of that panoply of programs to determine whether they can realistically meet current goals absent any bonus system.

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3. We continue to oppose Yonkers Green, particularly at this time. As the Court well knows, the City has made minimal progress in proceeding at East Grassy Sprain, the replacement site for school 15. It took the city at least 18 months to have a developer for that site in place and, just this week, the City has finally submitted for the court's review an LDA for that project.

To permit municipal support for assisted housing in southwest Yonkers through the donation of the Yonkers Green property to the developer while progress is so minimal at east side new construction sites is to send an entirely inappropriate message to the City and its residents. This project should not be permitted to commence, if at all, until construction has started at the other four new construction sites. Moreover, all parties should be involved in developing any affirmative marketing program, including a determination of the quantum of resources needed and how those resources will be spent. Until new construction at all other sites commences [and, under the court's recent determination, that should be within four months, not a major delay for Yonkers Green] and until the parties have agreed upon a substantive affirmative marketing program and upon the resources for its implementation, Yonkers Green should not be permitted to proceed.

4. The court has now tentatively ordered that new construction on all sites should commence by the end of 1999. We welcome that kind of order, but know that the City has set and circulated numerous unmet deadlines for new construction. To make this deadline real, we believe that the court must require twice monthly written reports from

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Yonkers officials specifying precisely the status of each project and identifying any barriers or obstacles to commencement of construction by January 1, 2000. The Monitor then should follow up and deal with any identified obstacles, promptly seeking judicial assistance where required. Without this kind of intense follow through, the NAACP fears that this deadline will be treated like prior ones, without urgency and priority.

5. Finally, while we support the use of additional section 8 vouchers in Yonkers, we believe that HUD will require a showing of City support before cooperating with this program and making more vouchers available. The Court should direct the United States to initiate contact with HUD on this matter and report timely as to what the City needs to do to access additional section 8 resources. The City should then be required to so proceed in a time certain so this effort becomes more than an aspiration.

We are prepared to participate in an evidentiary proceeding on these issues or to present any further argument should the Court find that helpful. Thank you for considering our views.

Respectfully submitted,

s/ Michael H. Sussman
MICHAEL H. SUSSMAN

cc: Counsel of record
Dennis Hayes, Esq.
Len Buddington, Esq.

APPENDIX 32 — LETTER FROM RAYMOND P. FITZPATRICK, JR. TO HONORABLE LEONARD B. SAND RE TENTATIVE FINDINGS DATED AUGUST 20, 1999

LAW OFFICES OF
FITZPATRICK, COOPER & CLARK
FARLEY BUILDING, SUITE 600
1929 THIRD AVENUE NORTH
BIRMINGHAM, ALABAMA 35203

* * *

August 20, 1999

Honorable Leonard B. Sand
United States District Court
Southern District of New York
500 Pearl Street, Room 1650
New York, New York 10007

Re: *U.S. v. City of Yonkers*, 80 CIV 6761 (LBS)

Dear Judge Sand:

I am in receipt of the Tentative Conclusions of the Court distributed by the Housing Monitor on August 11, 1999 as well as Mr. Sussman's letter of August 18. At our monitoring meeting on Monday, August 16, the Monitor directed the parties to make written submissions to the Court concerning the tentative findings by today.

This process started last February when the NAACP and United States opposed parts of the City's 1998/Year 2 credit

report. They urged the institution of outreach and rental programs with greater emphasis on Priority 1 placements. On February 24, 1999, the Court directed the parties to work cooperatively with the Monitor to seek resolution of these matters promptly. The City has cooperated in proposing programs to meet the Court's concerns that have been approved by the Monitor. It is now August and these matters remain unresolved. The NAACP now seeks yet another hearing at which it claims it will present unspecified "evidence." The City has submitted a factual record which has not been contested by any party. There is no need to delay matters further with an evidentiary hearing.

We have reviewed the Monitor's proposals as well as the Court's Tentative Conclusions. Based upon our review of those two documents, the following constitutes an outline of what we understand the Court to approve:

1. Priority 1 Outreach — The City's proposed program is approved and to be implemented. In addition, the City program shall include a rental outreach component to be developed by the City within thirty days.

2. Rental Assistance Program — As a part of its effort to meet its SSLTPO, ¶ 2 obligations, the City shall move forward with its proposed rental assistance program that shall seek to provide 20 units per year using the first three programs outlined below. The rental assistance program shall serve areas outside southwest Yonkers in census blocks that are under 45% minority. The program includes the following three components:

(a) Home purchase assistance — shall be provided on a Priority Basis for families purchasing 2-4 family homes.

(b) Lease to purchase — shall be implemented for Priority 1 families only.

(c) Rental buydown program — shall be implemented for Priority 1 families only.

In addition, with respect to the Monitor's recommendation concerning Section 8 units, the City shall pursue receipt of Section 8 resources from New York State DHCR and HUD with assistance from the Housing Monitor and United States during the next ninety days. The Court further stated that any Section 8 goals will be over and above the 20 unit sub-goal of the three programs identified above. The Court further stated that such units will not be counted as a part of the Priority 1 Placement goal outlined below.

3. Year 2 Credits — The Court agreed with the Housing Monitor's proposal to confirm an additional thirty credits for the City for Year 2. The Court rejected the City's request for 11 YCAP credits.

4. Priority 1 Placements (PIP) — In order to further the placement of Priority 1 families through the existing housing program, the Court stated that in future years there shall be an annual subgoal of 20 Priority 1 families (not including any Section 8 placements). The Court recommended additional incentive credits for all Priority 1's if the City meets the goal of 20 transactions. The Court also stated that there shall be a one credit penalty for each Priority 1 placement under 20 and no credit shall be provided if the annual total of Priority 1 placements is 10 or less.

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5. Integrative goals — The Court stated that no future credits or use of AHTF money shall be permitted for transactions that "do not further integrative goals." The only definition of integrative goals the Court provided is an example that "placement of a minority family in Runyan Heights" is not acceptable. The Court stated that the City may obtain pre-clearance from the Housing Monitor with input from the parties on proposed transactions.

6. Yonkers Green — The Court stated that Phase 1 should go forward and provided further detail with respect to the implementation of the affirmative marketing plan with reports every ninety days from the developer to the Housing Monitor. In addition, the earlier recommendation of the United States that the priorities of the LTPO not be applied to this project is approved.

7. New Construction — The Court stated that all four new construction projects should be underway by the end of the year.

The Court's findings do not provide any further definition of the term "integrative purposes of the order" other than to make clear that placements of a minority family in Runyan Heights are not acceptable. The City has previously proposed a means of clarifying this provision of the orders in a way that furthers the original purpose of the Housing Remedy Order. As we have stated in previous submissions, the Housing Remedy Order was designed to provide affordable housing opportunities in non-minority neighborhoods outside southwest Yonkers. In order to more accurately pinpoint the target areas for affordable housing,

the City proposed to use the map developed by the Department of Justice which identifies census blocks by racial composition. The City proposed that census blocks outside southwest Yonkers with minority populations greater than 45% be treated in the same manner as southwest Yonkers census blocks. This portion of the City's proposal was adopted by the Monitor in her rental program recommendation but is not mentioned with respect to the homeownership program. The City believes its proposal represents a fair and objective means of more accurately defining the target areas for the affordable housing that furthers the purposes of the Housing Remedy Order.

The Monitor's recommendation does not propose a goal for the Section 8 program. The City indicated in the monitoring meeting its willingness to explore the availability of Section 8 resources to further the SSLTPO. At the same time, the City agrees with the Monitor's recommendation that it is best to maintain the program primarily as a homeownership program. For that reason, the City recommends that the Court defer any order directing the use of Section 8 for the achievement of a Section 8 goal and instead allow the City to explore the extent to which Section 8 resources are available. Only after the level of availability is fairly determined should the Court consider whether to set a goal.

Finally, although not clearly stated in the recommendation, it is our understanding that the current restrictions on Priority 2 and 3 transactions will be lifted. We request that the Court's decision make that clear.

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We do not see the need for an evidentiary hearing of the sort requested by Mr. Sussman. The City has submitted various reports to the Court since February that document its performance in the existing housing program. The racial composition of the beneficiaries has been submitted and the facts concerning compliance have been developed. The request for an evidentiary hearing is an effort to further delay resolution of these matters by the Court and publicize an attack on this program during the local re-election season. While the City does not agree with some aspects of the Court's tentative findings, and we maintain the positions stated in previous submissions, we are unaware of any factual matters that need to be developed further. Nor has Mr. Sussman identified any fact issues.

Thank you for your consideration of this matter.

Respectfully,

s/ Raymond P. Fitzpatrick, Jr.
Raymond P. Fitzpatrick, Jr.
Attorney for Defendant
City of Yonkers

RPFjr/deb

cc: Marilyn Melkonian, Housing Monitor
Laura O. Lazarus, Esq.
Diane L. Houk, Esq.
Michael H. Sussman, Esq.
Stephen M. Jacoby, Esq.

APPENDIX 33 — LETTER FROM MICHAEL H. SUSSMAN TO HONORABLE LEONARD B. SAND RE ATTORNEY'S AUGUST 20, 1999 LETTER DATED AUGUST 20, 1999

LAW OFFICES OF MICHAEL H. SUSSMAN
ATTORNEYS AT LAW

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* * *

August 20, 1999

Honorable Leonard B. Sand
United States District Court – Southern District of New York
500 Pearl Street
New York, N.Y. 10007

re: US v. Yonkers — Housing issues

Dear Judge Sand,

By letter dated August 20, the City claims that there is no reason to hold an evidentiary hearing on current housing issues and avers that the NAACP has raised no factual issue. The City portrays itself as fully cooperative in the process which, since February 1999, has occupied the parties. To clarify further the current situation, we address the court again.

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1. The February 1999 proceeding derived from the plaintiffs' concern that Yonkers had failed to properly and timely implement our October 1996 Stipulation. To that date and this, the City's progress on new construction had been minimal and no units have yet come on line. The City's implementation of the existing housing program featured (a) more benefits to Caucasian families making segregative moves than to Priority 1 families making integrative moves, (b) a substantial under-service to Priority One households, (c) an express, boastful disregard of the racial consequences of its program and (d) a recalcitrance to share racial data of program recipients.

2. As of August 1999, the City has a gap of at least 50 credit units from years 1 and 2. This year, its existing housing program has served 26 families to date, a figure which, if protected through year's end, would cause a doubling of the current shortfall in credit. The City has made no proposal for new construction [as envisioned] to compensate for this gap. Nor has the Court directed it to do so. This was one of the major points made by the NAACP in requesting the hearing which occurred last February and remains a pressing demand, despite the intentionally dilatory pace the city as demonstrated in carrying out the new construction already required. New construction is needed to make up the difference between the 100 unit goals for 1997 and 1998's existing housing programs and the credit for those years. If the City is prepared to identify sites for this new construction now, absent further evidentiary proceedings, the Court should so direct and we need not have a hearing for this purpose. If as I suspect, the opposite is true, then we do need a hearing — to make a record which would properly predicate an order directing the city to identify such locations and forthwith proceed with the RFP process.

3. As noted in my immediately prior letter, the Court has proposed a radical diminution in the total number of units which may be provided under the October 1996 order. It has done so without an evidentiary hearing and without citing to any record basis or explaining its decision. As we strongly disagree with the proposition that this Court can so act with giving all parties full and fair opportunity to express themselves and present testimony on such matters, we reiterate our request for a hearing. As stated previously, if, as we believe the evidence will show, the City has not appropriately provided for Priority One families, this would substantially support our position — that the plaintiffs should not suffer a diminution of program goals — a benefit to the City — due to the defendant's own omissions and failures. If anything, the goals should be increased, not diminished, in recognition of the fact that years of delay have harmed class members and frustrated the court orders.

4. We also see the need for the Court to further clarify its tentative conclusions: judging from the City's recent letter, it is quite plain that while its housing office intends to comply with the "integrative goals" section by not subsidizing minority moves into Runyon Heights, its counsel does not read this language as merely illustrative of a broader prohibition on the use of AHTF monies to support non-integrative moves by white families. The City's proposed use of the government's map evades this issue, which is at the heart of the current controversy. To this moment, the City has never conceded the utter inappropriateness of subsidizing the non-integrating moves of white families and without further clear direction from Your Honor apparently never will.

5. Regarding Yonkers Green, there is no approved affirmative marketing plan and the City does not address the need to develop one and the process to be used to develop and implement such a plan.

In short, before this Court reduces the number of units the City must provide to comply with the October 1996 Stipulation, an evidentiary hearing needs to be held. That hearing should assess the City's compliance with the 1996 October order and determine whether anything in the years since its entry justifies such a downward reduction in unit count through the kinds of generous bonuses the court's tentative order suggests. The hearing should also assess the options for new construction sites and hear any proposals which the parties have in that regard. While Yonkers would like all involved to forget its shortfall in production to date, the 1999 record makes such forbearance impossible and calls out for more strict implementation of the original agreement between the parties. Finally, elections come and go in Yonkers while the NAACP remains steadfast in its support for full implementation of court orders and appalled by the City's claim that it seeks to politicize these issues, something the City and its counsel have graduate degrees in.

Yours sincerely,

s/ Michael H. Sussman
Michael H. Sussman

cc: All parties and the Monitor

APPENDIX 34 — TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 9, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 6761 LBS

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH, NAACP, et al.,

Plaintiff-Intervenors,

v.

CITY OF YONKERS, et al.,

Defendants,

and

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SAMUEL PIERCE, SECRETARY,

Added-Defendants,

and

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THE STATE OF NEW YORK, et al.,

Added-Defendants.

September 9, 1999
11:04 a.m.

Before:

HON. LEONARD B. SAND,

District Judge

[2] (In open court)

(Case called)

THE COURT: Who is here on behalf of the NAACP?

MS. HOUK: Mr. Sussman is here. He will be with us in just a minute.

THE COURT: The subject matter on our docket this morning follows a series of meetings and memoranda, and Mr. Fitzpatrick was kind enough to send a memorandum to everybody setting the date and time for this and says, "I don't know whether this session will be a meeting or a hearing."

I am not quite sure what that dichotomy is. I understand there is an issue as to whether an evidentiary hearing is required. I know the difference between an evidentiary hearing, which involves the calling of witnesses and generally to resolve disputed questions of fact and ending up in the court's making findings of fact. I am saying that

the difference is between an evidentiary hearing and a hearing. I am not sure I know the difference between an evidentiary hearing and a hearing.

MR. FITZPATRICK: I was trying to avoid phone calls to me from people trying to say what is going to happen today. I was just telling the parties I don't know.

THE COURT: Let me just put on the record the documentation which precedes this. There is Ms. Melkonian's [3] memorandum of July 28th, summary of issues and proposals, marked as Court Exhibit A of today's date.

There is M Mr. Sussman's letter to the court of July 30th, Exhibit B of today's date.

There is a Department of Justice letter by Ms. Houk of August 4th, Exhibit C.

There is Mr. Sussman's letter of August 18th, Court Exhibit D.

There is Mr. Fitzpatrick's letter of July 30th, Court Exhibit E.

There is Ms. Lazarus of Telesis's memo of August 11th, which attached a document that is Judge Sand's tentative conclusions, Court Exhibit F.

There is Mr. Sussman's letter of August 20th, Court Exhibit G.

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There is Mr. Fitzpatrick's letter of August 20th, which will be Court Exhibit H.

It had been my thought that after that extensive exchange of views, that we could proceed to an order. There was a request by the NAACP that the court not go to an order prior to an opportunity for the parties to appear before the court and have oral argument. Then there was a further request for an evidentiary hearing.

Mr. Sussman, I'm not clear, when you request an evidentiary hearing, whether you are of the view that there [4] are disputed questions of fact which makes such a hearing appropriate. Are there disputed issues of fact here?

MR. SUSSMAN: Good morning, Judge. Thank you.

Yes, I guess the question you're asking goes to the heart of what we're doing, and it is my judgment for the NAACP that there has been a substantial failure by the City of Yonkers to carry out appropriately the October 1996 agreement.

If the court's response to that, for instance, is to diminish the number of units which Yonkers must provide over the life of an agreement negotiated by the parties, then it is my judgment that a hearing would be required because it is our view that, if anything, the lag in time should result in an increase in the number of units which have to be remedially provided, not a decrease.

I don't buy the proposition that a defendant who has not properly implemented a program, not met goals, not engaged

in the new construction, not met the timetables it has set repeatedly, deserves from a district court a break, so to speak, or a set of incentives to meet the remedial objectives.

Secondly, to the extent that it is Yonkers' position, which has been repeatedly suggested by its counsel, that the program need not foster racial desegregation and that the court must somehow remain neutral between the use of federal subsidy dollars to benefit whites making segregative moves on the one hand and minorities making desegregative moves, which [5] I believe are the only moves that can be fostered, with the possible exception of whites making desegregative moves, which I don't know if any occurs, I think it is we need a hear to flush out what it is that is very significant disputes.

As a factual predicate, there is a dispute how the entire program has been run. It is plain to me — and the court — I don't know if it is plain to the court, frankly, so if I ask for an evidentiary hearing, I want to put on the record what I think has occurred. It is plain to me since the years this program has begun that Yonkers has taken a very knowing and intentional position that the assisting Priority II and Priority III households is not only acceptable, but is of prime moment, and most of those households are white, most of those households, probably every one I know of, has not made an integrative move, and the City of Yonkers has supported them through the use of scarce monies which we have.

I also think there is an evidentiary hearing needed on the new construction situation. The mayor has repeatedly

talked publicly about getting the government, you, me, off his back. I have heard that every year since he has been in office and repeatedly during the years.

It is my position currently that if the new construction is typified by the city selecting after its protestations this minority development company Edmonds in June or July of 1998, setting the schedule which presented to [6] the monitor and the court by which construction would be commenced by the end of 1998, and then not even submitting to the court until August 13, 1999 an LDA, and if that is deemed compliance with something, I don't know what it is complying with. It is not complying with anything.

I would like to understand and I would like there to be a record as to why this is and why it is with regard to every single project.

THE COURT: Let me suggest to you that the court has a different focus.

MR. SUSSMAN: That is not unusual.

THE COURT: I don't think there is a quarrel with the proposition that the accomplishments to date fall far short of what one hoped for.

The court's focus is on what revisions are appropriate to the housing remedy order to accelerate both the volume and the direction and emphasis of future efforts.

I don't think there is a need for a hearing to establish the proposition, for example, that the city administration's

preference for home ownership as distinguished from rental units has had an impact and that there has been a neglect of the needs of the Priority I members of the class. I think that such a hearing would lead to the conclusion that changes have to be made and that there has to be a greater, not lesser, supervision.

[7] MR. SUSSMAN: Here is my problem, Judge, with all due respect: To the extent that the court clearly assumed, as it did under our October 1996 jurisdiction and authority to make changes and revisions which are intended, based on the empirical evidence to forward the objectives of the decree, I don't believe — given that there is a record as you pointed out earlier, and I agree with you on that — I don't believe there is a need for an evidentiary hearing, but, but, to the extent that what the court's response to that weight of evidence is to say, in effect, in effect, though you're not saying it directly, there will be a diminution in the number of units which is established under Gompers' goal, under that program, a negotiated goal the parties established, I think there is a need for a hearing. That is what I was responding to in my letters.

THE COURT: The history of the 800 units is well known. There was the consent decree submitted to the court at the time the court had posed the question whether the appropriate number of units should be 400, 600 or 800.

MR. SUSSMAN: You said 200, 400, 600 or 800.

THE COURT: This court has never made a finding of what the appropriate number of units has been. Now, if you're

suggesting that there should be a hearing at which one ascertains the current state of the Yonkers market and the needs now of — and if what prompts that request is the [8] court's suggestion that there be a carrot and a stick to encourage the addressing Priority I, it seems to me that that is not worth a candle. I think the time and the effort that would be involved in such an inquiry to deal with whether there should be a dozen more or a dozen less units would be counterproductive.

What I would like to see for the NAACP is a very specific proposal this is what should be done, and we can and in all likelihood will go through each of the items and discuss the merits.

MR. SUSSMAN: We're prepared — look, you say very specific proposal. We have been advocating specific proposals and discussing them in our monitor's meetings.

THE COURT: Yes.

MR. SUSSMAN: The problem is that the city did not come forward and say at any time, through a motion or otherwise, we cannot meet the needs of Priority I people if we have an aggressive rental program which includes a Section 8 component. That has not been its assertion. I haven't heard that in any of its meetings.

THE COURT: Therefore?

MR. SUSSMAN: Therefore, the need for a change, the need for diminution in the number and the need for a quote-unquote bonus, even carrot and stick —

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THE COURT: May I suggest —

[9] MR. SUSSMAN: Sure.

THE COURT: — may I suggest that it will be more productive if we turn item by item and we deal with it in that fashion.

MS. HOUK: Your Honor, there is one thing I would like to do preliminarily which I hope is of some assistance to the court. Since you've marked the correspondence as court exhibits, we provided a week ago to the parties two maps that have been prepared by the department which visually reflect the locations in which people have bought homes in 1998 and 1999.

THE COURT: Yes.

MS. HOUK: Distinguishing between minority and non-minority buyers, and I have not received any corrective comments from anyone, and so I have brought with me today for the court a set of the maps under seal since they do contain the charts with the addresses of the families that are subject to protective order and then an extra copy for you to refer to today as we discuss these issues.

THE COURT: That sounds very helpful.

(Pause)

MR. FITZPATRICK: Consistent with Ms. Houk's comments, there was a map that Ms. Houk also submitted to

the court last February 24 which I think in the same way plotted the addresses of everybody in the first two years. We had it [10] on the easel. I don't know if the court still has that in its files, but if we could make that an exhibit as well as the submissions that the parties made earlier than July; that is, from my standpoint, my February 22, 1999 submission as well as the June 21, 1999 submission —

THE COURT: Well, I don't have them on the bench with me now. Let's deal first with Ms. Houk's submissions. I have been handed two documents. One is the map, the LTPO credit report, one is for 1998, and one is for 1999. Why don't we mark those 1998 as Court Exhibit 1, and that is going to be under seal. Yes, that has names and addresses under seal.

And the '99, we'll mark it Court Exhibit J, under seal.

MR. JACOBY: Just for clarification, your Honor, do the two maps that you have in front of you, I and J, right now have on the top "Draft"?

MR. SUSSMAN: Yes.

THE COURT: No.

MR. JACOBY: Just the maps?

THE COURT: All right. Now, what did you want on the record?

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MR. FITZPATRICK: There was a map that the Department of Justice produced for us earlier this year that I thought contained all of the closings in the first two years.

MS. HOUK: No.

[11] MR. FITZPATRICK: I'm wrong?

MS. HOUK: Yes.

MR. FITZPATRICK: Okay.

MS. HOUK: The map Mr. Fitzpatrick was referring to was prepared in December of '98. It reflected the 1998 moves as of December of '98. However, in subsequent monitor meetings, not a large number, but a certain number of errors were identified. So what I have presented today is based on a May 6th, 1999 report prepared by the court monitor which is attached to the '98 map.

In addition, the map I am presenting today distinguishes between minority and non-minority buyers, which the December of '98 draft did not. The final clarification is what I have submitted today does not include the Y-cap placements during 1998.

MR. FITZPATRICK: Nor does it include any of the Year 1 placements.

MS. HOUK: Exactly, I do not have a map for Year 1.

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I do not have the racial data for Year 1 from the city, so we could not not prepare a minority and non-minority map for the court in this time-frame. If the city were to prepare that, we would help to prepare that map.

MR. FITZPATRICK: I would differ to the United States on that. We have provided the racial data for Year 1 to the full extent it was available, but that is here nor there.

[12] THE COURT: Let's see if we can be affirmative about this. We have two questions. One relates to credits for what has gone before and what will be the criteria for future.

I have in my tentative conclusions stated that I would accept the summary of recommendations contained in Ms. Melkonian's report with respect to what has happened in the past because the past is the past, but that no future credits will be granted unless the housing opportunities created further the integrative goals which are the essence of all of the court's prior housing remedy orders, intending to counter the effects of prior racial discrimination in housing.

I gave as an example of a move which would not be credited, nor would AHTF funds, AHTF funds be available for that purpose. The move of a minority family into Yonkers Heights, I gave that as an example. The NAACP has commented that that was too limited an example, and it was really an example, it seems to me to be an egregious case of a misuse, and that is why I use it as an example.

Let me ask Mr. Sussman how affirmatively would you describe the moves which would be appropriate for the grant of a credit and for the use of housing trust funds?

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MR. SUSSMAN: There are neighborhoods that have been defined as areas of minority concentration since the beginning of this case. There was a statistical definition given to that. White families are to make use of the program and who [13] wish to make desegregative moves in that context, that would, it seems to me, be supportable.

If white families want to move from one predominantly white area to another, it would not be. If white families want to move from the areas of minority concentrations to white areas, it would not be permissible. Just like, as your example indicates, if black families or Hispanic families want to move from one minority area to another, they have a right to do that, but they don't have a right to do that under the aegis of a program intended to foster racial integration and remedy this segregation. I don't think that is difficult, frankly.

The issue here is an update, and I think Ms. Houk has information on that and perhaps Mr. Fitzpatrick is in agreement on in terms of at least the definition of a map or maps which would indicate and be references for a contemporary understanding of Yonkers in that context. Yonkers has, as you know, somewhat changed in the 18 or 20 years we have been doing this, so clearly the nature of certain neighborhoods at least is a little bit different.

For instance, the near northwest, north of Glenwood was understood as a predominantly white neighbor is not that. There is movement of popular African-Americans into that northwest area of Yonkers, the middle area near the river and also toward the Saw Mill Run Parkway, which changed its racial [14] character.

THE COURT: You would do that both by language and by a reference to a map?

MR. SUSSMAN: Yes, your Honor.

THE COURT: Ms. Houk, do you agree with that?

MS. HOUK: Yes, I think ultimately in order for the program to work on a day-to-day basis for the staff, they will need not just language, but they will need a map to refer to.

However, I do think that if the court at this point were to issue an order which included language that was clear that in order for anyone to participate in the program, no matter what the race, that their move, their particular move must further the integrative purposes of the order, so that that applies both to minority and non-minority families that are moving. I am hopeful that the parties can sit down with the staff to then create the geographical boundaries.

We only have 1990 census data today. Within the next year or two we will begin to have the 2000 census and we hope to have some flexibility to be able to respond to that, and so that the housing staff can respond to those changes, which we know there have been demographic changes in Yonkers, but we don't have that census data. So for now, it may be appropriate to have one particular set of lines. Those may be needed to change in another year or two before the program comes to an end.

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[15] THE COURT: What would the criteria be? What would the demographics be to qualify the move as an integrative move?

MS. HOUK: There are several ways to define that.

Our concern were if the court were to specifically today define that by establishing a percentage or to draw the lines, that, in fact, we would then be interested in having an opportunity to have an evidentiary hearing and provide a record on what is the appropriate way to do that. That is something that is not, we believe, in the record before the court yet today because there are several ways to do it.

HUD uses definitions of impacted and non-impacted areas which may be appropriate in this case. There are other ways of simply doing it geographically.

THE COURT: Which way do you think is the preferred way?

MS. HOUK: Well, we think that there are a couple of different ways it can be done here and that both will work. It can be done on a census track, census block or neighborhood level. It can be done by using street addresses. It can be done by using population percentages.

We have never been able to have that conversation with the city about those details because we have been unable to reach agreement on the beginning point, which is that we need to have a remedy that does provide benefits for families, [16] both minority and non-minority, who make integrative

moves. So if we got that directive from the court, then I would be hopeful that we could have a conversation with the city, and particularly with the staff who is working with the families, to see if we can come to agreement on the particular mechanism we want to use.

We would only want a short period of time to do that. Then if we couldn't, obviously the court would have to resolve that. To be honest, we have never had the second part of that conversation with the city.

THE COURT: Mr. Fitzpatrick, let me ask you this: it seems to me — I am not talking about the mechanics. Let's talk about the mechanics and whatever else you want to say on that issue. Assume that it is the court's intent to implement the concept that no future credits will be granted unless the housing opportunity created furthers the integrative goals of the neighborhood. Then there are two ways that one can deal with it in an order:

One is by language without specific geographic preferences and put in a provision such as I suggested, that if the city has any questions, it can get a prior ruling. That is one way.

The other way of doing it is, as Ms. Houk has just been discussing, that there be a formula so that there would be no need for any prior submission or determination with [17] respect to whether or not a creation of a housing opportunity would qualify or not. That would, I suppose, have certain administrative advantages, in that the city could move forward without having to go through any type of a clearance procedure.

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Do you have any views as to —

MR. FITZPATRICK: On that specific question, your Honor, I would opt toward the latter approach because it provides clarity to the applicants in the process who are looking for homes. If toward the end of the process we have to obtain some preclearance, after the family has found a home, gained an interest in that home, they put their heart into achieving that home, only to be told at the end of the process no, it doesn't meet the policy requirements of the order, that is very difficult and that is the issue that I have faced with staff on countless occasions over the past few years.

THE COURT: Your answer doesn't surprise me, and I suppose what one would say is that there has to be a provision for periodic updating or alteration because, as Mr. Sussman has stated, it is a fluid population.

MR. FITZPATRICK: Your Honor, in dealing with this particular issue, though, I think it is important to be clear that there are two factors involved here in better defining the meaning of the term, "furthering the integrative purposes [18] of the order."

One deals with the families, one deals with the location. What the city has proposed, just so I can be clear, is that up until now the only defining lines that we have had to deal with are the traditional boundaries of southwest Yonkers.

Mr. Sussman is correct, there have been demographic changes, and those demographic changes are reflected in the

maps that your Honor has before you. What the city has suggested is that we take the maps produced by the government, and if you see the different colors on the right-hand side and I am not going to guess at what those colors are because I am color blind — in addition to almost blind, I think — in any event, I have suggested both in the correspondence to the court and to the parties and monitor that we more or less expand southwest Yonkers to include those census blocks that are more than 45 percent minority, which would take southwest Yonkers up Warburton Avenue on the left side of the map.

It would clearly include all of Runyon Heights, it would include the area along Saw Mill River Road that Mr. Sussman just mentioned, and it would thereby provide greater definition for those areas that are areas of minority concentration. That is something that is very clear, I can hand the map to the staff and say this is to be treated just like southwest Yonkers, this is not.

[19] That is one side of the issue, and what we have proposed is that we provide affordable housing, full credit affordable housing outside those areas that the government has defined as areas of minority concentration according to this map. If the government has some other way of defining it, they haven't shared that with us. These are the maps that we have been receiving for the past year.

THE COURT: Ms. Houk.

MR. FITZPATRICK: We are willing to live with them. If I can finish this?

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There is one other matter I want to put this in context with you. That is that the city should treat different families that walk in the door and apply differently depending upon their race.

If you listen to what Ms. Houk and Mr. Sussman said in their proposal, they want the city to treat either minority or non-minority families differently based upon their race in determining what housing should be made available to them.

As the city reads the orders right now, the city is to provide housing outside the areas of minority concentration as currently defined for applicants that meet the priorities of the court order, priorities not defined in terms of race. So it is important to be clear that the government and the plaintiffs are suggesting that we use race as a criteria in determining what housing is made available to what families, [20] and that is a matter that the city thinks is entirely unnecessary here and unjustified.

THE COURT: Tell me, how are you going to determine whether or not a move is racially integrative without regard to the race of the person whom the housing opportunity is offered and the demographics of the area in which the offered housing is obtained? How would you do that?

MR. FITZPATRICK: That is a question that I addressed at perhaps too much length in my submission of June 21st, and I would rely upon that entirely, but it is important to understand that it is the city's understanding of how the entire program is to work is to provide racially integrative housing

opportunities through the provision of a pool of affordable housing in the areas that were previously excluded from affordable housing opportunities.

For instance, the new construction opportunities that will soon be made available, those are not being made available only on the basis of race. The clients are not being screened on the basis of race. None of the contractors understand that they're to apply any racial criteria, nor should we apply racial criteria to the applicants for existing housing.

The purpose of the program is to make available a pool of affordable housing to people who meet the criteria of the order, both income and priority, and it is expected that [21] by making that housing available and targeting it based upon priority, which we are working hard to do now, that there will be a racially integrative effect, and the numbers bear that out.

THE COURT: What numbers bear that out?

MR. FITZPATRICK: The information that we submitted last February, where we summarized the demographics of the people who have received housing, and I don't recall the exact numbers off the top of my head, but it was my recollection that over 70 percent of the families that received housing in the first two years of the program were either black or Hispanic, which is disproportionately higher than the city population, naturally.

In other words, by applying race-neutral criteria, by relying upon the priorities of the order, and by targeting to

the appropriate income groups, we have a racially-integrative effect. Where we differ with the plaintiffs is they say every single individual opportunity must be race-based. We say no. We say the program should be applied in a race-neutral fashion, but using the priorities of the order which were carefully negotiated 10 years ago, we will have a racially-integrative effect, and the numbers bear that out. That is in the record already, and the majority of the people who are receiving housing are minority. That is undisputed. It can't be disputed.

[22] So we need to address that fundamental question of are we looking at individual transactions or are we looking at the effect of the program as a whole?

We think the better approach here is to stick with the original understanding of the LTPO, which was to provide a pool of affordable housing in the appropriate target areas, target it based upon the priorities, target it based upon the income, and it will have a racially-integrative effect. The results so far bear that out.

We are not applying race in the new construction program and we don't see a reason to apply it in the existing housing program.

THE COURT: Mr. Sussman.

MR. SUSSMAN: Yes, thank you, Judge. Well, a couple of comments.

First of all, the evidence to date does not bear out that the priorities of the order have been followed. The evidence

to date shows that there has been a significant lack of production, lack of opportunities for Priority I families. In fact, this year —

THE COURT: The class on whose behalf this case was brought and certified did not have an economic component.

MR. SUSSMAN: No, it didn't.

THE COURT: Indeed, that is my recollection of an application being made very early after the liability decision [23] to include homeless, and it was rejected. So that when you say there has been neglect of Priority I families, you are talking about a subset of the class, but that does not mean that —

MR. SUSSMAN: No.

THE COURT: — people who have benefited who are not Priority I are not members of the class.

MR. SUSSMAN: Priority I is not defined by economics.

Priority I is defined by persons who have in the past lived in public or subsidized housing in the City of Yonkers. Those are the people who were discriminated against by the placement policies the court dealt with in its liability decisions, which, of course, were affirmed. It is that group that has to have the remedy.

The Priority II folks are people who live in Yonkers, and the Priority III people are people who work in Yonkers.

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Now, if you look at the data which Mr. Fitzpatrick is relying on, first of all, just so the record is absolutely clear, there is no data based on race for 1997. It has presented none. The government has none and I have none.

The claim has been that none was collected, and that was assiduously repeated. Where by 1991 we got racial data, which the city at the time has embraced, said was anecdotal, not based on real numbers, it neglects real numbers. If you look at the data, the map shows this, Judge, what you have in [24] 1998 were approximately 37 white homeowners, home buyers. If you look at these people, they're denoted by green here; and if you look where they're buying homes, they're buying homes with city and federal subsidy in white neighborhoods.

Now, how does that come within the compass of a remedy order? It doesn't. Race neutrality was produced in this case, and if you looked at the locations of where these people came from, you would find a number of them came from southwest Yonkers and then moved with subsidy to white neighborhoods. How can that be justified as part of a remedy order? It can't be.

What race-neutrality has done — those people are also not not Priority I. You have a focus on these people not in Priority I who are Caucasian, who are getting the benefit and not fostering in any manner the integrative purposes, remedial purposes of this court's order.

Now, with regard to the minority households, some minority households have moved into Runyon Heights, we

have pointed that out in the past, and others have been appropriately been subsidized to make integrative moves which we are not objecting to. That is what the whole purpose of the program was. There has to be a consciousness of race for there to be a remedy of racial discrimination. To say that the program can somehow operate with race neutrality is to produce these results. A third of the benefits or more are [25] provided to people who are not in any way remedially entitled. That is the same argument, by the way, as I pointed out in my papers, which the Court of Appeals found so appealing and the city and state said it and the school cited the case.

EIP II is overbroad and not a remedy. I don't agree with it because I don't think you can have a school remedy in fact which is more tailored because, in a school context, unless you create segregation, you can't address compensatory needs other than by a broad-base program. We tried to argue that in the Court of Appeals. I thought we were right and still think so.

In the housing, the spirit is totally different. Programs are administered on a case-by-case basis; and, therefore, you can have race consciousness in a totally consistent manner.

Moreover, the proposal how to advance today does not exclude whites from program benefit. Whites are able to participate in the program as long as they participate in an integrative manner. If they don't want to, they don't participate. No one compels them to. To say they can get government benefits to move from one white neighborhood

to another and they can get government benefits to move out of southwest Yonkers to white neighborhoods and that should be part of this program is absurd.

THE COURT: Does anyone else want to be heard on this [26] issue?

MS. HOUK: Yes, just a short matter.

Addressing the city's specific proposal of using 45 percent minority as a cut off for the program as a whole, because it only addresses one side of the picture, it would actually increase, or let's say it this way, would actually decrease the integrative opportunities available to non-minority families. So we believe if there is going to be some kind of numeric equation, it would have to apply also to non-minority families.

In the rental program that Ms. Melkonian has endorsed which she has included a 45 percent minority definition — and I think in the court's tentative findings are there is some support for that — we do not object to that because the rental program is limited only to Priority I households, which are overwhelmingly black and Hispanic. It is only when we leave Priority I that we then need to become more concerned about the percentages and the non-minority families that are making use of the program that are not Priority I families.

THE COURT: Mr. Fitzpatrick.

MR. FITZPATRICK: I would just like to point out two things in response:

First of all, let's be clear. Priority I perhaps is majority-minority, is overwhelmingly minority. We don't dispute that. But Priority I is not defined in terms of race. [27] There are white families that can be members of Priority I.

Also Priority I is not a subset of the class. That is an issue that was argued out apparently in 1988, and if the class is defined in racial terms, then Priority I through sheer logic cannot be a subset of the class.

The other thing is —

THE COURT: Except couldn't you have it both ways?

Couldn't you say race is irrelevant with respect to Priority I applicants? For non-Priority I applicants, credit will be given only if the opportunity created meets the racially-integrative characteristics?

MR. FITZPATRICK: I don't see any need for the court to do that, and I think you're in violation of strict scrutiny requirements by creating that racial classification where it is not needed because the program is effective, and the Year 1 racial numbers are in my February submission, Tab 1 under what is called Section 3.

THE COURT: What is the answer, Ms. Houk, Mr. Sussman, to the suggestion that, with respect to Priority I, race is irrelevant? If it is a non-Priority I move, then it must meet the racial criteria that —

MS. HOUK: The United States would have no objection to that. It, in fact, recognizes that there is a difference in the

outcome of assistance for Priority I as opposed to Priority II and III families. If we were at the beginning of [28] this process before we had tried it, it might be premature to reach that conclusion, but we now have enough data in this particular situation to know how the program is operating and the impact it has had.

So it is appropriate for the court to respond to that specific data and to clarify within the priorities how the moves will be defined.

THE COURT: Let me wrap this up.

I think in theory, Mr. Fitzpatrick, that if you were dealing with large enough numbers and enough funds, the argument is that the creation of all of these opportunities will, without more, result in a more open Yonkers housing market which would be consistent with the objectives of the remedy order that you would have.

We are dealing really with a relatively small number of units and very limited funds, and the experience has not been satisfactory. The court, therefore, determines that a provision must be made to insure that moves which are entitled to equalization of housing trust funds and entitled to a credit be moves which further the integrative goals which underlie the entire remedy order.

With respect to Priority I applicants, there is no need to make inquiry into race because, with respect to all of the Priority I applicants, we are dealing with people who are the hardcore victims of prior housing practices.

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[29] With respect to opportunities afforded other than Priority I, then in order to be entitled to the credit and use of the funds, the move must meet certain criteria, to be spelled out in the order both in language and geographical reference, subject to periodic revision.

If in the rare, I would think rare, case in which there is any ambiguity, there is the ability to get a priority clearance.

I would adopt Mr. Fitzpatrick's suggestion that, in terms of the administration of the program, there is a preference for having criteria spelled out rather than them requiring preclearance in all instances.

I'll ask Ms. Houk, together with Ms. Melkonian, Mr. Fitzpatrick and all the others, to confer further with respect to the definition of the criteria and embody it in a proposed order to the court.

Now let's move on to another issue, and that is the credits for Priority I placements. Again, the past is the past, and I accept the recommendation made in Ms. Melkonian's report with respect to past credits. We were at a time in the process in which we were all learning, and we should not, I think, retroactively change the ground rules.

I proposed in my tentative recommendations in Court Exhibit F a system pursuant to which there is both an incentive to the city to increase the Priority I placements [30] and a penalty, that is, to go over the annual goal of 20 and a detriment if the goal is not reached.

Now, Mr. Sussman is correct that the consequence of that system is that the number 800 may be reduced, but it will be reduced only by virtue of success in addressing the needs of the prime victims.

Unless anyone wishes to be heard further on that issue, I would —

MR. SUSSMAN: May I make one more comment on that?

Mr. Fitzpatrick earlier pointed to something in his February 22, 1999 report, which is Section 3, just for the record, of Tab 1. What this shows, Judge, is that in Year 1, the city got credit for 63 units; in year 2, with the Y-cap units removed, it got credit for something like 78 units, given the court's earlier ruling with regard to credit, which is a total of 141 credits over the first two years.

What the NAACP would suggest, your Honor, with regard to the bonus, so to speak, is that the bonus yearly at this point go to compensate for the gap which has already obtained of some 60 units in the first two years. The October '96 document has a back-up provision for the gap, assuming one were to be found, and there has been one statistically found over the first two years. This year there are only 26 existing units through August 15th, approximately, so the gap has been increased, not decreasing, if one defines it by a [31] hundred units a year as the document does. Your conception of the bonus, I suggest, go towards compensating for those prior years, units where there is a gap.

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THE COURT: I am not understanding how it would work.

MR. SUSSMAN: Assuming for the moment, Judge, that the city were to get additional units, more than 20, your bonus system would kick in, your bonus system might provide as many as 15 credits in addition to the 20.

THE COURT: Yes.

MR. SUSSMAN: We believe that is wrong, for all the reasons already explained. The court feels otherwise. I understand that. What I am suggesting is that rather than go toward this year's units, that bonus go retroactively to make up for the gap which exists in the goals which have been annually set.

THE COURT: With what consequence?

MR. SUSSMAN: The consequence is that: currently under the order — and we had this discussion in February — there has to be something done to deal with the past, the past is the past, but we have the six-year program and we already have 50 units in the first years which were not created, which were supposed to be created.

THE COURT: Yes.

MR. SUSSMAN: What I am suggesting is that the bonus, if there is a bonus, be applied to that deficit, not to this [32] year's or any given year's number of a hundred.

That way we're beginning to deal with the lack of production, we are using the incentive system to deal with the past lack of production, and we're curing that if it can be cured.

THE COURT: But doesn't the past failure to meet the goals, the total number we're looking for is 800, right?

MR. SUSSMAN: 600 over 6 years.

THE COURT: 600 over 6 years, and so doesn't the past gap have to be made up in any event?

MR. SUSSMAN: It does, but anticipating that there is a controversy and will be further controversy about how to make it up, what I am suggesting is it would seem to me rational, given that we have a gap at that level and it is fairly significant already and increasing, unfortunately, that what we do is use any bonus units to apply to that so as to reduce it.

In that way, when we come to the end, we may be dealing with a lesser of a gap, less dramatic a gap. I am just suggesting that as a way of giving credit rather than to see to it this year. Maybe it is not consequential. To me, it would make a difference in explaining it and perhaps selling it.

MR. FITZPATRICK: Your Honor, we would oppose that. I think the court's tentative conclusions indicated that the bonus system would apply to future years. That is our [33] understanding of what the court's proposed.

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THE COURT: I understand, I understand what Mr. Sussman is proposing, but I reject it and I will ask that the order embody the credit system indicated in my tentative conclusions.

MS. HOUK: May I address one other point that Mr. Sussman and Mr. Fitzpatrick did not?

THE COURT: Sure.

MS. HOUK: Currently the number that you've set as the trigger point for the bonus is 20.

THE COURT: I said assumed 20.

MS. HOUK: We assumed 20, and that correlates to the city's current proposal for a rental program, anticipating 20. All of these are guesstimates, but that rental program will be limited to Priority I participants, so presumably that will make it easier for them to meet the 20 trigger point that you have suggested.

Our concern about the number 20 is that we're also anticipating and hoping that we will be having discussions about developing a rental assistance program in addition to the 20. That program, if that program is in place, the number, 20 would be an inadequate number. We would want it raised at that point.

THE COURT: The reason I said "assuming 20" is because it was without regard to the other programs, and to [34] the extent to which we trigger in the other programs, that number has to be adjusted, I agree with that.

MS. HOUK: With that consideration, then we have no objections.

MR. FITZPATRICK: Your Honor, we didn't understand the proposal that way at all. We understood the 20 goal to be separate and apart, and I am sorry I don't have it in front of me at the moment, your conclusions. We support the proposal as written by the court last month.

THE COURT: As I say, I said "assumed 20" because it was dealing solely with that issue.

The next matter is the Section 8. Now, with respect to the Section 8 rental program, in all of these memos which we have identified for the record as discussion about expiration of Section 8, availability, what is the present status of that?

MS. HOUK: I can address that. I have had preliminary conversation with HUD about the development of a Section 8 rental assistance program, and they have indicated to me a willingness to meet with the city and the public housing authority along with my office and Ms. Melkonian, to begin to discuss what particular avenues there may be available for that and what kinds of information, data collection and application would need to be made in order to satisfy HUD regulatory and administrative requirements.

[35] They are available to have the initial meeting within the next couple of weeks. The process for then putting together a particular program would probably take a couple

of months. I've indicated to them your tentative conclusions, and I think Ms. Melkonian's recommendation was a 90-day period, which would take us to the end of November.

Let me say it a different way. If we have an opportunity to discuss and try to develop this program through the end of November, use the month of December to bring to the court any remaining problems, what we would hope is that we would be looking to start something in the year 2000 program year so that it would have three years of operation until the end of the order.

That is not HUD. I say that from my office at the Department of Justice. That timetable is one we have no objection to including in a court order and we think would help facilitate the process.

THE COURT: Mr. Fitzpatrick, do you have any problem with that?

MR. FITZPATRICK: We have previously indicated no objection to pursuing the availability with HUD. We think any goals should remain an issue that is unresolved at this time.

THE COURT: That is fair enough. That is fair enough. That is fair enough.

All right. Yonkers Green, I have read all the [36] material that has been submitted to me on Yonkers Green, and what I said in the tentative conclusions was it may go forward provided that there is an affirmative marketing plan.

Now, has such a plan been promulgated, Mr. Fitzpatrick?

MR. FITZPATRICK: It is only a part of the recommendations. As far as I know, we have not moved forward. We have been waiting for a resolution here.

I think the issue we discussed at the last monitoring meeting was whether or not there was a mechanism in place whereby the city could require the contractor to do these things because the court does not have jurisdiction over the developer, and I am prepared to say that the city will make those requirements a part of the land disposition agreement for this project.

The developer has not yet developed a plan, but we will require the developer to do that if the court wishes to incorporate that in the order.

THE COURT: How long will it take, do you think, for the developer to submit the affirmative marketing plan?

MR. FITZPATRICK: It is not a project that is within my sphere of influence in City Hall, but —

THE COURT: Yes, it is. It has just become within your sphere of influence.

MR. FITZPATRICK: Thank you, your Honor.

[37] I would request three weeks to submit a draft plan to the housing monitor for her review and that we can discuss it.

THE COURT: Fine, fine. Now, new construction, all new construction projects are to be in construction in 1999.

Is that happening?

MR. FITZPATRICK: That is our goal, and I think it is an achievable goal.

THE COURT: Anything else? What else is there?

Ms. Melkonian, is there anything you wanted to say?

MS. MELKONIAN: I think that covers the issues. I don't think the parties have others at this time.

THE COURT: All right. I am going to ask, then, since I think the primary drafting problem is going to relate to the statement of the criteria, Ms. Houk, that you take the laboring oar, if you would, in the preparation of an amendment to the prior housing remedy orders embodying the substance of all these matters. I will make myself available should anything further be required. Is there anything else that anybody wants to bring up?

MR. FITZPATRICK: Not to be obnoxious about it, but just for the purposes of the record, I think that any use of race as a criteria in allocating housing benefits, whereas families are treated differently on the basis of race, is inappropriate based upon the reasons set forth in my June 21, 1999 submission.

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[38] THE COURT: All right. I am aware that that is the city's position, and it is preserved.

Is there anything else?

All right. Thank you, all.

(Court adjourned)

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APPENDIX 35 — LETTER FROM RAYMOND P. FITZPATRICK, JR. TO HON. LEONARD B. SAND RE ADDITIONAL COMMENTS ON HOUSING ISSUES DATED NOVEMBER 18, 1999

LAW OFFICES OF
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BIRMINGHAM, ALABAMA 35203

* * *

November 18, 1999

VIA FACSIMILE
and FIRST CLASS MAIL

Honorable Leonard B. Sand
United States District Court
Southern District of New York
500 Pearl Street, Room 1650
New York, New York 10007

Re: *U.S. v. Yonkers*
80 CIV 6761 (LBS)

Dear Judge Sand:

During the meeting with Housing Monitor Marilyn Melkonian and the other parties last Monday, November 15, 1999, Ms. Melkonian advised the parties that she expects the Court to sign an order dealing with outstanding housing issues by the end of this week. Ms. Melkonian further advised the parties that she expected the order to be in substantially

the form as that drafted by Diane Houk, counsel for the Department of Justice, on September 17, 1999. While the City submitted comments and objections to the draft order prepared by the United States on September 24, 1999, following consultation with Mayor Spencer this week, I respectfully wish to submit the following additional comments.

The City continues to believe that entry of certain parts of the proposed order will materially damage the existing housing program and further slow the progress of compliance with the SSLTPO and other remedial housing orders. In February and June 1999, the City provided detailed submissions to the Court demonstrating the effectiveness of its program during the first two years of implementation and the reasons why we should continue to maintain its aggressive race neutral affordable housing program that has served the purposes of the Housing Remedy Order. The Mayor's affidavit confirming that the race-neutrality of the Order was bargained for in the SSLTPO negotiation remains unrebutted. The City continues to believe that any requirement that the City consider race in selecting applicants for housing or limit housing availability on the basis of race is both ill-advised and unconstitutional. The requisite findings needed to require race-consciousness in the City's housing program have not and cannot be made on the record before the Court. The City's race-neutral program is effective in providing integrative housing; if a race-neutral program works, then the Court is not permitted to require race preferences.

The draft order prepared by the United States, at subparagraphs 4(b) and (c), does not describe with reasonable

specificity the requirements of the Court in the City's implementation of the program. Specifically, the draft order infers that the City should take race into account but, for an unexplained reason, that is not stated clearly and with specificity. If the Court expects the City to act in a racially preferential manner, or otherwise distribute housing opportunities on the basis of race, then the Court should say so with specificity so that the City's duties in that regard are clear. This draft order does not make such expectations clear. As discussed during the hearing on September 9, 1999, the provision that the City should seek advance clearance from the Housing Monitor is administratively unworkable and unfair to the applicants to the process. Entry of an order of the vague sort proposed by the United States here will only lead to more disputes and confusion in the implementation of the program.

Following Mayor Spencer's election four years ago, he met with the Court and we began a process designed to bring about completion of the City's obligations under the Housing Remedy Order. The SSLTPO was entered on November 6, 1996. No party should dispute the significant gains that were made in 1997 and 1998 in implementing a racially integrative program that provided housing opportunities to qualified applicants in all parts of Yonkers. Unfortunately, beginning in February 1999, the attacks on the program and limitations on the City's opportunities to complete housing transactions have slowed production. As reported in the recent monitoring meeting, current production of the program during 1999 is 31 units.

As further demonstrated by the report distributed to the Court and all parties by YAHD last week, partial copy

attached, the limitation to Priority 1 only does not allow the City to reach the annual goals of the SSLTPO. For example, despite very substantial outreach to public and subsidized housing residents over the past years to thousands of people, only 13 Priority 1 families are pre-approved and looking for a home. In addition, only 13 Priority 1 families have been qualified for rental housing. On the other hand, 119 Priority 2 families have applied for assistance but are being held in underwriting and are not being processed because of the limitations of the Order dated June 1, 1999.

Mayor Spencer believes it is best for all concerned to return to the positive efforts of 1997 and 1998. For that reason, and toward that end, he has requested that I advise you of his desire to meet and speak with you about such matters. Such an effort in 1997 began a time of the greatest progress in meeting Housing Remedy Order obligations. We urge the Court to defer entry of paragraph 4 of the order proposed by the United States and, with permission of the other parties, open such a dialogue with the Mayor.

Thank you for your consideration of these comments.

Respectfully,

s/ Raymond P. Fitzpatrick, Jr.
Raymond P. Fitzpatrick, Jr.
Attorney for Defendant
City of Yonkers

RPFjr/deb

Appendix 35

cc: Marilyn Melkonian, Housing Monitor
Laura O. Lazarus, Esq.
Diane L. Houk, Esq.
Michael H. Sussman, Esq.
Stephen M. Jacoby, Esq.

Appendix 35

SECTION III

APPLICATIONS IN PROCESS

I. NUMBER OF APPLICATIONS:

A. Pending applications (as of last report)			1152
B. New applications (received since last report)			29
C. Total			1181
1. Priority 1	303	26%	
2. Priority 2	805	68%	
3. Priority 3	73	6%	
	1181	100%	

Appendix 35

II. STATUS OF APPLICATIONS:

	Priority 1	Priority 2	Priority 3	TOTAL
A. Pre-Approved and Looking for a home	13	11	0	24
B. In Underwriting	23	119	9	151
C. In Homebuyer Club	40	11	0	51
D. Qualifying for New Construction	46	0	0	46
E. Qualified for Rental Housing	13	24	1	38
SUBTOTAL	**135**	**165**	**10**	**310**
F. Completing Application	114	587	58	759
G. Application Inactive/ Withdrawn	54	53	5	112
GRAND TOTAL	**303**	**805**	**73**	**1181**

Appendix 35

SECTION IV

SUMMARY

Year 3 Credits to Date

By Priority		By Income	H	%	By # of Bedrooms	H	%
P1	4	0-50%	8	26%	1 Bedroom	2	6%
P2	26	50-80%	16	52%	2 Bedrooms	14	45%
P3	1	80-100%	7	23%	3+ Bedrooms	15	48%
Total	31	Total	31		Total	31	

11/08/99

APPENDIX 36 — LETTER FROM MICHAEL H. SUSSMAN TO HONORABLE LEONARD B. SAND RE ADDITIONAL COMMENTS ON HOUSING ISSUES DATED NOVEMBER 21, 1999

LAW OFFICES OF MICHAEL H. SUSSMAN
ATTORNEYS AT LAW

MAILING ADDRESS
25 MAIN STREET
GOSHEN, NEW YORK 10924
(914) 294-3991
TELECOPIER: (914) 294-1623

* * *

November 21, 1999

Honorable Leonard B. Sand
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

re: Yonkers

Dear Judge Sand,

I have Mr. Fitzpatrick's letter of November 18; due to trial commitments, I have been slightly delayed in drafting this reply.

1. The existing housing program was not a rousing success during its first two years. In fact, as we have demonstrated,

the city failed by some 50 units to meet its goals and many of the credits were accounted for by Caucasians making segregative moves, a practice totally inconsistent with the court's remedial objective as expressed in the order.

2. Race conscious remedies are constitutionally required to redress like violations and the Supreme Court has never ruled to the contrary. There is no requirement that whites share in benefits directed to minorities to remedy past racial discrimination. While at times such "sharing" is inevitable, i.e., EIP 2, where a more focused remedial approach can direct scarce resources to members of the victim class, this is constitutionally compelled. The existing housing remedy is such an instance and the City's continued insistence on diluting the long-delayed remedy is nothing short of unconscionable.

3. The order before Your Honor for signature is clear and provides the City sufficient guidance.

4. The City's pre February 1999 production was below the goals agreed to by the parties; combined with the City's improper implementation of the program, this led to the February proceedings. John Spencer attacks the court and the plaintiffs at every public opportunity. For the City's counsel to trumpet his sincerity is baseless.

5. We oppose any further ex parte meetings between the Court and Mr. Spencer. If the Mayor has anything to add to this process, he should make his comments with all present. Too often, we fear, the city has made totally unverified claims to the Court. This is unfair to other parties.

Appendix 36

6. Finally, we note that the City has not come close to meeting their end of year construction start-up ordered by this Court in September. Then, the City counsel claimed his client would meet that objective. It is plain that this was a further baseless representation and that substantial efforts have not been made to so proceed. Instead, from the recent Monitor's meeting, it is plain that Yonkers continues to blame everyone else for the continued delays in even starting the first four projects.

We urge the Court to enter the long-awaited order which provide the city sufficient guidance and the plaintiffs renewed assurance that the remedial program will be structured in a manner necessary to accomplish central objectives.

Yours respectfully,

s/ Michael H. Sussman
Michael H. Sussman

cc: Fitzpatrick, Houk, Melkonian, Jacoby

APPENDIX 37 — NOTICE OF APPEAL DATED JANUARY 13, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

80 CIV 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

YONKERS BRANCH — NAACP, et al.,

Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION, et al.,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that the defendant City of Yonkers appeals to the United States Second Circuit Court of Appeals from the Third Supplemental Long Term Plan Order (dated and entered on December 29, 1999; doc. no. 1802) and all subsidiary orders including the Order dated June 1, 1999.

Appendix 37

Dated: January 13, 2000

s/ Raymond P. Fitzpatrick, Jr.
Raymond P. Fitzpatrick, Jr.
(RF 1705)

Law Offices of
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s/ William M. Mooney III/
by RPF with permission
William M. Mooney III
(WM 0486)

Corporation Counsel
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(914) 377-6250

Attorneys for Defendant
City of Yonkers

APPENDIX 38 — CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV, § 1

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
MAY 23 2001
CLERK

(3)

No. 00-1497

IN THE

Supreme Court of the United States

CITY OF YONKERS,

Petitioner,

v.

UNITED STATES AND YONKERS BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF OF AMICUS CURIAE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF THE PETITIONER

MICHAEL E. ROSMAN
Counsel of Record
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St., NW, Suite 300
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310 PP

QUESTIONS PRESENTED

1. What standard of review should be applied to a court's race-conscious remedial order designed to eradicate the vestiges of past discrimination in a city's housing policy?

2. What actions must a city take to eradicate the vestiges of past discrimination where it previously has had a discriminatory housing policy?

PARTIES TO THE PROCEEDING

Petitioner is the City of Yonkers. It was the defendant in the District Court and appellant in the Court of Appeals.

Respondents are the United States and Yonkers Branch, National Association For The Advancement Of Colored People. The United States was a plaintiff in the District Court and the Yonkers Branch, NAACP intervened as a plaintiff. They were appellees in the Court of Appeals.

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INTEREST OF AMICUS CURIAE

The Center for Individual Rights ("CIR") is a public interest law firm. It has participated in the litigation of numerous cases concerning the use of race by government officials, including *Reno v. Bossier Parrish*, 528 U.S. 320 (2000) in this Court.

CIR believes that the court below ignored an exceedingly important question: whether in eliminating the vestiges of a city's discriminatory housing policy, the city must reduce the actual racial identifiability of specific neighborhoods. Because this Court has given different answers to similar questions in different contexts, a careful analysis of housing, and the manner in which government regulates it, is needed. We hope to provide a start to that analysis here.[1]

STATEMENT OF THE CASE

CIR adopts the statement of the case in the petition. We highlight only a few significant facts.

The original 1986 Housing Remedy Order ("HRO") had two significant parts for the creation of additional affordable housing in Yonkers, Part IV and Part VI. Part IV required the City to submit a Housing Assistance Plan to receive funds from the federal Department of Housing and Urban Development ("HUD") for 200 units

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[1] Pursuant to Rule 37.2(a) of the Rules of this Court, all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, amicus curiae CIR affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

of public housing to be located on sites provided by the City. The parties agreed upon the sites for these units of public housing in Section 2 of the 1988 First Remedial Consent Decree. App. 120a-121a. Each of these sites were in East and Northwest Yonkers, and the units were built and occupied by 1994. Earlier, in 1991, the District Court gave then-residents of Yonkers public housing second priority for these units (after those on the waiting list for the units). App. 152a-53a.

Part VI of the HRO called for the creation of additional subsidized and/or affordable housing units in East and Northwest Yonkers. In Section 12 of the 1988 First Remedial Consent Decree, the parties agreed that 800 units was an appropriate goal. App. 125a. Section 13 of that same Consent Decree created a presumption in favor of using "mandated incentives" for private developers to create these units. App. 125a-26a. *See also* App. 141a-42a (similar priority in Section 5 of 1988 Long Term Plan Order).

When the city did not agree to a long-term plan consistent with (and called for by) the Consent Decree, the government moved for entry of its own plan, and the District Court entered it as the 1988 Long Term Plan Order. That order called for a minimum of 20% "affordable" units in all new construction multi-family developments in East and Northwest Yonkers until the goal of 800 was reached. App. 134a-36a. Section 4(f) of the Long Term Plan Order set forth "occupancy priority" in the affordable units to (1) residents of public or subsidized housing in Yonkers ("Priority 1"), (2) residents of Yonkers ("Priority 2"), and (3) persons employed in Yonkers ("Priority 3"). Section 8 listed various "mandated incentives" that the District Court instructed Yonkers to pro-

vide, including increasing the maximum heights for buildings, increasing the maximum floor areas, granting various tax abatements, and waiving certain fees. App. 144a-45a.

In October 1993, the Supplemental Long Term Plan Order modified the plan again. Specifically, the Court agreed with Yonkers that a number of affordable units (*viz.*, 250) could be provided through existing housing. App. 165a. At the same time, the Court ordered preconstruction activity to proceed on three sites that had been identified as sites for new construction: Yonkers Avenue, Cross Street, and Hoover Road. App. 158a.

Throughout this process, the District Court appointed and created various offices and officials to assist it in implementing the remedy. It ordered Yonkers to create a Fair Housing Office ("FHO") with the general responsibility of implementing fair housing policy in Yonkers and to conduct "educational" programs "to elicit support for the remedial efforts of the City . . . and to promote racial harmony in Yonkers." App. 101a. It created an Affordable Housing Trust Fund ("AHTF") to be administered by the FHO, which would use funds from HUD to foster private development of low and moderate income housing. App. 109a, 166a-67a. It ordered the creation of a Fair Housing Implementation Office ("FHIO") within the FHO to further facilitate remedial activities. App. 148a-49a. In the 1993 Supplemental Long Term Plan Order, it appointed a Housing Special Master pursuant to Rule 53 of the Federal Rules of Civil Procedure. App. 159a. Recognizing that the implementation of the new construction provisions of the remedy was "far beyond the capacity of the FHIO alone" (App. 164a), it gave the Housing Special Master further authority to appoint a third party for implementation of the new construction provisions. It also gave

the Special Master authority to appoint a third party for implementation of the existing housing provisions of the remedy. App. 165a.

In 1996, after recognizing that "the concept of having within the city someone or some group whose primary responsibility was to report to the Court didn't work well" (App. 175a), the District Court returned authority for implementing the remedy to the City of Yonkers in the Second Supplemental Long Term Plan Order.[2] In addition to ordering new construction to proceed on the three sites identified in the initial Supplemental Long Term Plan Order, the Second Supplemental order set a goal of providing 100 units of affordable housing per year using either new construction or existing housing. App. 178a-79a. According to that order a unit would count towards the City's obligation to provide "affordable" housing if "the *location* of the unit furthers the integrative purposes of the [Long Term Plan Order]" (App. 181a, emphasis added).

Despite this emphasis on the location of the unit as meeting the court's integrative purpose, the plaintiff-intervenors objected to the implementation of the plan several years later because it led to Yonkers subsidizing some moves that were not "integrative," *i.e.*, where whites

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[2] In addition, the court, with the input of plaintiff-intervenor, became more skeptical of its earlier emphasis on homeownership for those who had been residents of Yonkers public housing, *i.e.*, those who could qualify as Priority 1 applicants. App. 191a-92a (plaintiff-intervenor's counsel asserting that there is "a mismatch between a program that is highly homeowner oriented and the housing of priority 1 households. That is largely a financially driven problem. Obviously, there are psychological problems. People have rented their entire lives and know rent housing . . . and loathe home ownership").

moved to majority white neighborhoods and/or minorities moved to majority minority neighborhoods. The District Court agreed with this objection, and, in the Third Supplemental Long Term Plan Order, modified the criteria so that Yonkers would not get credit toward the goal of 100 units per year for providing affordable housing that facilitated such moves. Specifically, the Third Supplemental order provided that the city would only get credit, and AHTF moneys could only be expended, for the subsidization of (1) Priority 1 applicants, and minority Priority 2 and 3 applicants, seeking to move to majority white neighborhoods in East and Northwest Yonkers and (2) non-minority Priority 2 and 3 applicants seeking to move to majority minority neighborhoods in East and Northwest Yonkers. App. 28a.[3] The Third Supplemental order, then, treats white applicants and minority applicants for subsidized housing differently; because of the current racial make-up of East and Northwest Yonkers, the former will rarely have moves to those areas subsidized while the latter almost always will.

SUMMARY OF ARGUMENT

The "analysis" of the Second Circuit in this case was superficial in two respects. First, it assumed that the "strict scrutiny" standard assumed in *United States v. Paradise*, 480 U.S. 149 (1987) was the *only* relevant standard. App. 16a. "Strict scrutiny" usually governs the

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[3] Most Priority 1 applicants are minorities. Nonetheless, it is rather odd that the City apparently can get credit for subsidizing the moves of the few white Priority 1 applicants into majority white neighborhoods, a phenomenon that seems completely inconsistent with the District Court's purportedly integrative objective. (The City does not get credit for facilitating the moves of minority Priority 1 applicants into majority minority neighborhoods.)

analysis of race-conscious measures *voluntarily* adopted by state actors. When remedial measures are imposed by a federal court on state actors, additional factors must be considered. Second, the Second Circuit also assumed that the racial identifiability of particular neighborhoods is a "vestige" of past housing discrimination by the City of Yonkers that must be eliminated under the Fourteenth Amendment. App. 17a. But, "racial identifiability" is not always a "vestige" that should or even can be eliminated, and the court below failed to analyze whether it should be in the housing context.

Certainly, the fact that the Second Circuit did not consider these questions, or any of the case law cited below, suggests that there is confusion about the standards to be applied. Indeed, housing presents an excellent opportunity to apply this Court's principles to a new and important context. This Court should take this opportunity to clarify the law.

REASONS FOR GRANTING THE PETITION

Discrimination frequently produces segregation and racial identifiability. The Equal Protection Clause prohibits discrimination, and gives courts the authority to halt it, and to remove the "vestiges" of that discrimination. But whether "racial identifiability" is a "vestige" that a court is authorized to address depends upon context.

Where grade school desegregation is concerned, this Court has concluded that racial identifiability is a "vestige" that must be eradicated so long as the racial identifiability can be attributed to the past *de jure* system. *Green v. School Board of New Kent County*, 391 U.S. 430 (1968); *Freeman v. Pitts*, 503 U.S. 467, 486 (1992) ("The

Green factors are a measure of the racial identifiability of schools in a system that is not in compliance with *Brown* [*v. Bd. of Education*, 347 U.S. 483 (1954)], and we instructed the District Courts to fashion remedies that address all these components of elementary and secondary education").

So, too, when a state had been recalcitrant in opening its employment opportunities as state troopers to minorities, this Court has held that a district court can impose racial quotas to reduce the racial identifiability of various positions in that department. *United States v. Paradise*, 480 U.S. 149, 170 n.20 (1986) ("The one-for-one [black to white promotion] mechanism was employed not to punish the Department's failure to achieve racial balance, but to remedy the Department's refusal to fulfill the commitment made in consent decrees to implement a promotion procedure without adverse impact on blacks and to eradicate the effects of its past delay and discrimination. The racial imbalances in the Department are properly characterized as the effects of the Department's past discriminatory actions . . . ").

As discussed below, this Court has focussed on racial identifiability in grade schools and employment for reasons unique to those contexts, *viz.*, the significant control that school districts have over student assignments and employers have over promotions and hiring.

In contrast, in the state operation of 4-H Clubs and other clubs providing services to farmers, this Court has held that the elimination of racial restrictions is the only obligation of the state, and that the state need not do more than that to meet its obligations under the Fourteenth Amendment. *Bazemore v. Friday*, 478 U.S. 385, 408

(1986). This was so despite the fact that the vast majority of these clubs continued to consist of members of a single race even after the elimination of any racial restrictions. *Id.* ("The mere continued existence of single-race clubs does not make out a constitutional violation"; the obligation in *Green* to desegregate "has no application to the voluntary associations supported by the Extension Service").

Finally, in the context of eradicating a *de jure* system of higher education, this Court hewed a middle path. As in *Bazemore*, this Court has rejected *Green*-type balancing tests requiring the diminution of racial identifiability. *United States v. Fordice*, 505 U.S. 717, 730 n.4 (1992). *See also id.* at 745 (Thomas, J., concurring) (Court's standard "is far different from the one adopted to govern the grade-school context in [*Green*]"). But, it also distinguished *Bazemore*, and concluded that the lower courts should not ignore racial identifiability altogether. Rather, this Court held that, beyond establishing race-neutral policies, the state had the further obligation of eliminating unjustified educational policies that were (1) traceable to the *de jure* era, and (2) had segregative effects. *Fordice*, 505 U.S. at 731. Thus, a *de jure* era policy that *promoted* racial identifiability because it *restricted* private choice was a "vestige" of past discrimination and had to be eliminated.

1. In *Paradise*, this Court assumed that strict scrutiny was the highest standard of scrutiny that could be applied, and concluded that the court remedy there was constitutional because it met the requirements of strict scrutiny. *Paradise*, 480 U.S. at 166-67. The Second Circuit in this case made the same assumption, and reached the same conclusion. App. 16a.

In cases other than *Paradise*, however, this Court has suggested that other factors must be considered when analyzing the limits of the remedial powers of a court in an Equal Protection Clause case. Those remedial powers are limited to what the Constitution *requires* to eliminate the vestiges of past discrimination. *E.g.*, *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 200 (1972) (where Minnesota apportionment scheme violated the Constitution, action of three-judge court in drastically reducing the size of the Minnesota legislature "is *not required by the Federal Constitution* and is not justified as an exercise of federal judicial power" (emphasis added)).

In limiting the Constitutional *obligations* of a formerly dual system to the elimination of *de jure* era policies having segregative effects in *Fordice*, the Court did not purport to apply "strict scrutiny." (This Court never used the words "strict scrutiny" in either *Fordice* or *Bazemore*.) In other situations, this Court has also suggested that the ability of state actors voluntarily to remedy the present effects of past discrimination, although subject to strict scrutiny, may extend beyond what a district court might order. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 583 (1984) (in reversing a district court modification to a consent decree, where the modification precluded a city from using its seniority system to lay off firefighters because the layoffs would have a disparate impact on African Americans, the Court rejects the argument that the modification was permissible because it did no more than what the city could have done voluntarily; "Whether the City, a public employer, could have taken this course without violating the law is an issue we need not decide. The fact is that . . . the City took no such action and that the modification of the decree was imposed over its objection"). *Cf. Regents of the University of*

California v. Bakke, 438 U.S. 265, 379 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part) (although State university could remedy effects of societal discrimination by establishing a set aside for qualified minority applicants, "it is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program").

So, too, the supposition of those state laws that have restricted the use of racial preferences is surely that even those state laws that meet strict scrutiny are not necessarily *required* by the Constitution (and thus of the type that a district court could order). Otherwise, such state laws would be a nullity. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 709 (9th Cir. 1997) (upholding the constitutionality of California Proposition 209, eliminating racial preferences in public employment, education, and contracting; "To hold that a democratically enacted affirmative action program is constitutionally permissible because the people have demonstrated a compelling state interest is hardly to hold that the program is constitutionally required").

Here, of course, the City of Yonkers has not voluntarily undertaken the race-conscious plan in the Third Supplemental Long Term Plan Order. Rather, that plan has been imposed on it by the district court in this action. A district court may order race-conscious plans if the Constitution requires them to eradicate the vestiges of past discrimination, but they are not necessarily coextensive with the plans that state actors can adopt voluntarily. Principles of judicial restraint, and respect for the autonomy of state officials, should be considered when court orders are scrutinized. *United States v. Yonkers Bd. of Education*, 837 F.2d 1181, 1236 (2d Cir. 1987) (district

court's housing remedy order is valid because it "intrudes no more than necessary on the City's prerogatives"). To the extent the courts below went beyond what the Constitution requires, then they did "intrude . . . more than necessary on the City's prerogatives." Courts should do everything appropriate to remedy constitutional violations, but beyond that they have no authority to operate state or municipal government.

This Court should grant the writ to clarify the standard that is applicable to court orders designed to eradicate the vestiges of past discrimination, and the relationship of that standard to "strict scrutiny."

2. No matter what the standard, this Court must determine whether the "racial identifiability" of a neighborhood is a "vestige" or "effect" of past discrimination by the City of Yonkers properly remedied through a racially-discriminatory program.

No one disputes that the City of Yonkers engaged in unconstitutional discrimination by limiting public housing to the Southwest portion of the city for racial reasons. Nor can anyone dispute that such discrimination has contributed to the racial identifiability of various neighborhoods in Yonkers -- in short, segregation. Invidious discrimination almost always leads to some racially identifiable group. *Bazemore v. Friday*, 478 U.S. at 414 (Brennan, J., dissenting in part) ("There is no room to doubt, and the Court does not even bother to argue otherwise, that one of the *effects* of prior discrimination is the legacy of single-race Clubs that still exist in North Carolina" (emphasis in original)). But as *Bazemore* itself demonstrates, the Constitution does not require the elimination of *every* effect of past discrimination, and sometimes it does

not require the elimination of racially-identifiable groups.

Why does the Constitution require the amelioration of racial identifiability in certain groups (elementary and secondary schools in *Green*, employees in *Paradise*), but not in others (state-run 4-H clubs in *Bazemore*, previously *de jure* segregated colleges in *Fordice*), despite the fact that the segregated groups are all "caused" to some significant degree by prior discriminatory policies? With respect to grade school education, this Court in *Bazemore* explained that racial balancing was appropriate because "schoolchildren must go to school" and "school boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend." *Bazemore*, 478 U.S. at 408. To put the point another way, the state is so heavily involved in the racial make-up of its schools, a court might be skeptical of racial imbalance that results from any purportedly-neutral "process." Since the state had much less involvement in picking members for the clubs involved in *Bazemore*, no such skepticism was appropriate; the *continuing* racial identifiability of those clubs was not caused by *current* state policies.

State employment presents a similar issue, but also has other unique characteristics. A state employer has significant discretion over the criteria it uses to hire or promote. Where it has engaged in a long history of discrimination, as in *Paradise*, a "quota" that changes the racial identifiability of a group of employees may be considered an appropriate stopgap measure until genuinely neutral and validated employment criteria are in place. Indeed, in *Paradise*, the "quotas" were to be used only until validated promotion procedures were in place. *Paradise*, 480 U.S. at 178 ("Most significantly, the one-for-one

requirement is ephemeral; . . . . The requirement endures only until the Department comes up with a procedure that does not have a discriminatory impact on blacks"). *Cf. id.* at 197-98 (O'Connor, J., dissenting) ("The order at issue in this case clearly had one purpose and one purpose only -- to compel the Department to develop a promotion procedure that would not have an adverse impact on blacks . . . The order imposed the promotion quota only until the Department developed a promotion procedure that complied with the consent decrees. If the order were truly designed to eradicate the effects of the Department's delay, the District Court would certainly have continued the use of the one-for-one quota even after the Department had complied with the consent decrees"); *Local 28 of the Sheet Metal Workers, Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 450 (1986) ("a district court may find it necessary to order interim hiring or promotional goals pending the development of nondiscriminatory hiring or promotion procedures"). Again, the amelioration of the "vestige" of a racially-identifiable group (employees) seems to be combined with a strong sense that the racial remedy is a prophylactic to ensure that *current* practices are non-discriminatory. *See also Sheet Metal Workers*, 478 U.S. at 448 ("Where an employer or union has engaged in particularly longstanding or egregious discrimination, an injunction simply reiterating Title VII's prohibition against discrimination will often prove useless and will only result in endless enforcement litigation. In such cases, requiring recalcitrant employers or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the work force may be the only effective way to ensure the full enjoyment of the rights protected by Title VII.").

Moreover, because the pool of potential beneficia-

ries is relatively small in an employment discrimination case, there is a much higher likelihood that the beneficiaries of the "desegregating" quota were, in fact, victims of the prior discriminatory practice. While this may not be true for every beneficiary, this Court in *Paradise* suggested that it was generally true there. *Paradise*, 480 U.S. at 173-74 ("To permit ad hoc decisionmaking to continue and allow only 4 of 15 slots to be filled by blacks [as suggested by the defendant Department of Public Safety] would have *denied relief to black troopers who had irretrievably lost promotion opportunities*" (emphasis added)).

In contrast, when extension clubs or colleges are concerned, the state exercises less control over which one an applicant applies to and admissions criteria are often minimal and fairly standard. In addition, new applicants will much less frequently be likely victims of the previous *de jure* system of higher education. Thus, so long as the state is not improperly influencing private choice with its current policies, racial balance is not needed to insure that current procedures are non-discriminatory. Nor is it needed to provide complete remedies to individual past victims of discrimination.

Of course, racial identifiability itself may be a factor influencing private choice. That is, as a practical matter, an African American applicant for college may be more likely to choose an historically black institution than an historically white institution, and the opposite might hold true for white applicants. *Podberesky v. Kirwan*, 38 F.3d 147, 160 n.13 (4th Cir. 1994) (noting the high numbers of African Americans attending historically and predominantly African American schools). But neither *Bazemore* nor *Fordice* ever suggested that the Constitution requires the elimination of *this* influence on private choice,

although it is surely a vestige of the past *de jure* system. *Fordice*, 505 U.S. at 731 (noting that, in *Bazemore*, "any racial imbalance resulted from the wholly voluntary and unfettered choice of private individuals" even though the segregated clubs had been previously supported by the state). Rather, *Fordice* requires the elimination of continuing *policies* from the *de jure* era with segregative effects, and which are educationally unjustifiable. It does *not* require the elimination of the effects (like racial identifiability) themselves, even where those effects no doubt influence private choice. *Fordice*, 505 U.S. at 746 (Thomas, J., concurring) ("[W]e focus on the specific *policies* alleged to produce racial imbalance, rather than on the *imbalance* itself" (emphasis in original)).

Housing presents a situation simply not addressed in this Court's prior opinions. We believe it is closer to the contexts of *Bazemore* and *Fordice* than it is to the contexts of *Green* and *Paradise*. People choose themselves where to live, guided by economic and other factors. The state itself does not assign people to neighborhoods. Thus, elimination of racial identifiability is not needed as a prophylactic to insure that current state practices are non-discriminatory, even though it influences private choice to some degree.

Of course, where *public* or *subsidized* housing is at issue, as it is in this case, private choice will be influenced by the absence of such housing in particular neighborhoods. Thus, it may be appropriate in such cases to insure that public and/or subsidized housing is available in all parts of a jurisdiction that has previously relegated it to one area. Like the elimination of segregative policies traceable to the *de jure* era in *Fordice*, such measures simply insure that private choice is truly free and not

improperly influenced by anachronistic state policies that foster segregation.

Under this analysis, the difference between the Second Supplemental Long Term Plan Order and the Third Supplemental Long Term Plan Order is crucial. The Second Supplemental order provided that Yonkers would get credit for providing a housing opportunity where "the *location* of the unit furthers the integrative purposes of the LTPO." App. 181a (emphasis added). The creation of such units permits integrative private choices and precisely remedies the Constitutional violation: relegating public housing to one area for racial reasons. *Cf. United States v. Yonkers Bd. of Education*, 837 F.2d at 1236 (district court's order to construct family housing outside of Southwest Yonkers "is closely tailored to the City's constitutional violations and intrudes no more than necessary on the City's prerogatives, consistent with ensuring that some remedial action will in fact occur"). The city's Fourteenth Amendment obligations would be complete under a *Fordice* analysis. In the Third Supplemental order, though, the city only gets credit for moves that meet the District Court's race-conscious standard of "integrative." The purpose is not just to eliminate the municipal policies that foster segregation, but to eliminate the *de facto* segregation itself, and to do so through unambiguously race-conscious means.

This Court should grant the petition in order to clarify the requirements of the Fourteenth Amendment in the housing context. More specifically, this Court should determine whether the elimination of *de facto* segregated neighborhoods is an obligation of state actors whose past discrimination has fostered such neighborhoods even after those state actors are using race-neutral rules and have

eliminated policies that limited private integrative choices.

3. Finally, even if the race-conscious subsidy policy had been voluntarily adopted by the City of Yonkers, and not imposed upon it by the District Court, it is still doubtful that it would pass muster under "strict scrutiny." Just as not everything causally related to past discrimination is a "vestige" that *must* be eliminated to comply with the Fourteenth Amendment, so, too, not everything causally related to past discrimination is a "present effect" that *can* be eliminated using blunt policies that treat people differently on the basis of race.

Plainly, by itself, racial balance is an inappropriate goal. *Bakke*, 438 U.S. at 307 (Powell, J.) (medical school's efforts to assure a particular percentage of minorities within its student body was a "facially invalid" justification for racial preferences in admission; indeed, it was "discrimination for its own sake"). The lower courts have suggested that racial balance is not appropriate even in a university that was part of a *de jure* system. In both *Podberesky* and *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), the courts examined racial preferences in schools that had previously been entirely segregated and that were still predominantly white. In each instance, the court of appeals found the system of racial preferences -- a scholarship only for African Americans in *Podberesky* and a system of admissions preferences for African Americans and Mexican Americans in *Hopwood* -- unconstitutional, and in each instance, the court of appeals concluded that certain effects of the past *de jure* system, even were they proven to exist, were simply not remediable through race-conscious policies.

Each school claimed that the system of racial pref-

erences was needed to counter the "bad reputation" that the school had among minorities due to its legacy as a "white school" in the earlier *de jure* system. Rejecting that argument, each court pointed out that such a "justification" would permit the school to continue to use racial preferences indefinitely into the future, for as long as history books recounted the previous era. *Hopwood*, 78 F.3d at 952-53; *Podberesky*, 38 F.3d at 154.[4]

4. If racial identifiability in housing *is* a vestige or effect which should or can be remedied, then it would seem that the District Court in this case should be free to engage in more radical solutions if the current plan is ineffective. For example, the court could simply require Yonkers to pass a law preventing whites from buying or renting in majority white neighborhoods and minorities from buying or renting in majority minority neighborhoods. (Or, to approach the problem more gradually, preclude one of every five or ten people seeking to move to a home or apartment in Yonkers from making such moves.) If such a solution seems unduly restrictive of individual freedom, it deserves emphasis that the current remedy in the Third Supplemental order is just as restrictive to those who cannot afford to move without subsidy.

These "integrative" solutions go well beyond the

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[4] In *Podberesky*, the court also considered whether African Americans were "underrepresented," but the discussion makes clear that it would make a finding of "underrepresentation" only if African Americans were underrepresented in comparison to the body of *qualified* applicants. *Podberesky*, 38 F.3d at 156-57. That is, if the body of qualified applicants had a lower proportion of African Americans than the population as a whole, leading to fewer African Americans at the University of Maryland, the "racial identifiability" of the student body would *not* be a compelling governmental interest.

first priority of all remedial relief: to make injured individuals whole. Here, the primary persons in that category would be the Priority 1 applicants. Yet the remedy in the Third Supplemental order provides some relief for members of that group only if they are willing to make the integrative moves desired by the District Court, and not otherwise. *See also* n.3, *supra*. At the same time, the remedy provides benefits for Priority 2 and Priority 3 applicants who are unlikely victims of the City's past discrimination. In short, the remedy here elevates the remediation of racial identifiability over make whole relief to victims.

CONCLUSION

Not only is it questionable whether "racial identifiability" is the kind of "vestige" of past discrimination, the elimination of which is a constitutional *obligation* that a court can enforce, it is perhaps equally doubtful that it is the kind of past effect that state actors *can* remedy, under strict scrutiny, through racially-discriminatory means. That being said, this Court has not clearly articulated the distinction between a court's duty to eradicate the vestiges of past discrimination and the ability voluntarily to remedy the effects of past discrimination, and when the "racial identifiability" of a particular group falls into one category or the other. This Court should grant the petition and resolve these issues.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 00-1497

In the

Supreme Court of the United States

CITY OF YONKERS,

Petitioner,

v.

UNITED STATES and YONKERS BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT

Yonkers Branch, National Association for the Advancement of Colored People, respectfully submits this brief in opposition to the City of Yonkers' petition for certiorari.

REASONS FOR DENYING CERTIORARI

THE COURT OF APPEALS' DECISION CONFLICTS WITH NO PRECEDENT OF THIS COURT AND CREATES NO INTRA-CIRCUIT CONFLICT

The City of Yonkers has provided no basis for this Court to grant its petition for a writ of certiorari. Its hysterical and distorted arguments ignore the history of *United States v. Yonkers* and its own continued disregard of Court orders. To this date, in its fifth year of a program intended to provide 100 affordable housing units/year to remedy past segregation and discrimination, the City has provided fewer than *200* total units. And of these, at least 30% of the counted "moves" have exacerbated racial segregation, not been integrative in any manner.

Having been granted "local control" in November 1996 to ensure construction of new assisted housing, which it had stalled for years of non-cooperation, Yonkers has failed to even commence construction at two of the four sites, Hoover Road and East Grassy Sprain Road. To date, two households have occupied any newly constructed unit, both within the last month at Cross Street.

Yonkers argues that neither the district court nor the Court of Appeals made "intensive" findings that racial classification was necessary in devising a remedy order. This is nonsense. As Yonkers administered the remedy before the December 1999 Court Order, white families with *no* claim to relief received more assistance than hundreds of minority families

which had been victimized by racial discrimination and segregative practices.

Petitioner has cited no case of this Court or of any Circuit which conflicts with the decision of the Court of Appeals for the Second Circuit.

Yonkers cites to several cases in which this Court has overturned or limited *voluntarily* implemented affirmative action programs intended to relieve under-representations of minorities in municipal employment, contracting or one or another area of our nation's social or commercial life. *See, Adarand Constructions, Inc. v. Pena*, 115 S.Ct. 2097, 2107, 132 L.Ed.2d 158 (1995) (applying strict scrutiny to such affirmative action programs when adopted by the federal government, as opposed to state or local governmental units, and remanding for further fact-finding). It is clear that in *these* contexts, where there has been no adjudication that government, at any level, has violated the constitutional rights of racial minorities, this Court has severely restricted the use of race conscious remedies. For example, in *Adarand, supra.*, Justice O'Connor reviewed how this Court has treated two kinds of cases: those in which racial or ethnic minorities challenged governmental classifications which *disadvantaged them* in a *de jure* manner, *i.e., Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954) (requiring federal government not to use racial classifications which adversely limit the rights of racial minorities and finding *such* classifications odious) and those in which governments voluntarily adopted affirmative action programs of one or another sort to benefit racial minorities. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (plurality opinion by Justice Powell requiring exacting judicial review of any racial classification adopted by legislative or administrative branches of government); *Wygant v. Jackson Board of Ed.*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (reviewing voluntarily

adopted policy by School Board governing lay-offs of teachers); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct.706, 102 L.Ed.23d 854 (1989) (reviewing voluntarily adopted municipal set-aside program and holding that strict scrutiny was to apply to racial classification, regardless of group alleged to benefit). In both of these settings, this Court has required exacting review under the strict scrutiny standards of programs which intentionally deprive or intentionally advantage racial minorities.

However, these cases have developed parallel to another, equally plain judicial doctrine — that Courts of equity, having found that government action has intentionally violated the constitutional rights of racial minorities, have broad equitable authority to shape appropriate, race-based remedies. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971).

Where, for instance, *federal courts* have concluded that school districts or municipalities have engaged in intentional violations of the Equal Protection clause, the same "legislative findings" as are referenced in *Croson*, *supra.*, are not required before use of race-conscious remedies.[1] This follows the basic principle that the federal courts' role in such cases is to right the constitutional wrong and put the affected class in the position they would have been in absent the constitutional violation. The nature and scope of the remedy is determined by the nature and scope of the underlying constitutional violation. *Milliken v. Bradley*, 418 U.S. 717, 738, 94 S.Ct. 3112, 3124, 41 L.Ed.2d 1069 (1974). As the Second Circuit has noted, this Court has not required that the "least restrictive means of implementation" be adopted in remedial

[1] While noting the distinction between the respect due judicial findings warranting remedy and the analysis applied when legislative majorities adopt race-conscious programs, the Court of Appeals for the Second Circuit did not rely on this distinction below, holding, instead, that the district court's order "clearly survives even strict scrutiny." (16a).

context, but has rather "recognized that the choice of remedies to redress racial discrimination is a 'a balancing process left, within appropriate constitutional or statutory limits to the trial court.'" *United States v. Paradise*, 480 U.S. 149, 107 S.Ct. 1053, 1073, 94 L.Ed.2d 203 (1987), cited in *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1236 (2d Cir. 1987).

Here, Yonkers excluded black and Hispanic families from housing opportunities in East and Northwest Yonkers for generations. An appropriate remedy requires actions by the City and its sub-divisions intended to provide housing opportunities for *these victims* in the cited sections of Yonkers. The remedy program is *not* intended for white people because white people were not the victims of the intentional segregative and discriminatory practices.

Yonkers argues that the court-ordered remedy excludes white people from housing benefits and equates this with the effects of voluntarily entered municipal programs which aim to direct governmental benefits to racial minorities. However, in logic, there is no such equation. In the first instance, a constitutional tortfeasor is ordered to provide *remedy*, benefits to those its conduct adversely affected. The rightful focus of such a remedial approach is, quite obviously, those intentionally deprived of benefit by the unconstitutional practice. In the second instance, local government seeks to re-direct certain benefits which it traditionally bestows, like employment opportunities or governmental contracts, *toward* one group, minorities. To be legitimate, such programs must be premised on what is tantamount to sustainable and rigorous legislative findings of prior racial discrimination. Absent such findings and the consequent need to *remedy*, albeit voluntarily, conditions which would otherwise predicate a lawful court order, race-consciousness in such voluntary programs is not permitted and offends the Fourteenth Amendment. The need to legislative findings which are analogous to findings

long since entered in this matter, *see*, *United States v. Yonkers Bd. of Educ.* 624 F.Supp. 1276 (S.D.N.Y. 1985) insures that racial classifications are not employed except where they must be — to remedy race-conscious discrimination and exclusion.

Correlatively, where judicial findings of exclusion have been made, race conscious remedies are not merely preferred — they are required. Any other regime would allow a federal court, and the federal judiciary, to direct governmental functions beyond the scope of the adjudicated violation, a clear usurpation of local authority. As applied here, the City of Yonkers' complaint that whites may participate in the judicially-crafted remedy more limitedly that blacks and Hispanics is simply another way of stating that the remedy is not a generalized program to provide housing subsidies to needy families — instead, it is an intentionally designed effort to cure racial segregation in housing patterns the petitioner City created and has still failed to remedy. The City's shrill claim that the district court is seeking some "racial balance" is a pejorative characterization of a perfectly legitimate judicial objective — providing racial minorities a genuine opportunity to move into white neighborhoods from which they have been excluded by systematic and long-since adjudicated government conduct.

What purpose would this housing remedy serve if it permitted, as Yonkers did between 1997–1999, white families to use scarce remedial resources to move from a white neighborhood to another or, even worse, from minority to white neighborhoods? It was this absurdity which Judge Sand's order of December 1999 was intended to curb. And, of course, this form of remedy administration puts the lie to Yonkers' claims that it has genuinely sought to remedy housing segregation for years since unfortunate missteps in 1988. In point of fact, Yonkers has continued to impede the remedy and tried the very considerable patience of the district court.

CONCLUSION

This Court should deny Yonkers' petition for a writ of certiorari.

Dated: May 29, 2001
Goshen, New York

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No. 00-1497

In the Supreme Court of the United States

CITY OF YONKERS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In 1985, the district court found that petitioner had intentionally segregated its public housing on the basis of race. Since then, the district court has adopted several race-neutral plans designed to remedy the continuing effects of that discrimination. Each time the existing plan was modified, the court found that petitioner had actively or passively resisted implementation of that plan, and that additional measures were required. The question presented is whether, in light of the district court's most recent finding that the existing plan was not achieving the goal of eliminating the continuing effects of petitioner's discrimination, the court erred in modifying that plan to include a limited, race-conscious remedial provision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 239 F.3d 211. The district court's remedial order (Pet. App. 23a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2001. The petition for a writ of certiorari was filed on March 28, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(c).

STATEMENT

The lengthy procedural history of this case is marked by petitioner's repeated failure to comply with court-ordered plans designed to redress the continuing

effects of petitioner's past racial discrimination in public housing.

1. Following a lengthy trial in 1983 and 1984, the district court found that petitioner had intentionally segregated its public and subsidized housing on the basis of race in violation of the Fourteenth Amendment and the Fair Housing Act, 42 U.S.C. 3601 *et seq.* *United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988). The court found that petitioner had intentionally relegated virtually all public housing to the southwest part of the City of Yonkers, which is primarily inhabited by minorities. To remedy that violation—which petitioner "does not take issue with" here (Pet. 21)—the court entered a Housing Remedy Order (HRO) that enjoined petitioner from taking any action that would further racial segregation in public or subsidized housing within Yonkers and ordered the development of a long-term plan to create additional subsidized housing in the east and northwest part of Yonkers. Pet. App. 109a-112a. That plan was affirmed. *Yonkers Bd. of Educ.*, 837 F.2d at 1184, 1236.

In January 1988, the parties negotiated a consent decree, pursuant to which petitioner agreed to create 800 units of subsidized housing by 1992 to fulfill its obligations under the long-term plan. Pet. App. 125a. Almost immediately, however, petitioner sought to avoid compliance with the HRO and the consent decree. *Id.* at 5a.[1] In June 1988, the district court entered a

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[1] Petitioner appealed the consent decree, and the court of appeals held that terms of the decree prohibited petitioner from seeking further appellate review of its obligation to provide public housing. *United States* v. *Yonkers Bd. of Educ.*, 927 F.2d 85 (2d Cir.), cert. denied, 502 U.S. 816 (1991).

Long Term Plan Order (LTPO), setting forth the specific steps that petitioner was required to take in implementing the HRO. *Id.* at 133a-150a. The LTPO directed petitioner to ensure that subsidized housing was dispersed in a manner that avoided "undue concentration of both public and assisted units in any neighborhood of Yonkers," *id.* at 136a, and created the following system for prioritizing persons eligible for assisted housing:

> Priority 1—persons who had been residents of public or subsidized housing in the City of Yonkers between January 1, 1971 and the date at which assisted housing under the LTPO was made available;
>
> Priority 2—residents of the City of Yonkers;
>
> Priority 3—persons employed in the City of Yonkers.

Id. at 6a, 140a. Under the terms of the LTPO, petitioner may earn housing credits toward obtaining the goals of the HRO and consent decree by placing individuals in affordable units in accordance with the foregoing priority scheme. *Id.* at 126a-127a, 147a.

Petitioner again "failed to implement the terms of the remedial order." Pet. App. 6a. At the district court's invitation, petitioner proposed an alternative long-term plan. *Id.* at 155a. The court granted petitioner's request for a lengthy trial-period to demonstrate the feasibility of its proposal, and held hearings on petitioner's plan in June and July of 1993. *Id.* at 156a-157a. In October 1993, the court entered a Supplemental Long Term Plan Order (SLTPO) that required petitioner to provide 250 subsidized housing units from existing housing, and the remaining housing units from

new construction. *Id.* at 159a-166a. Petitioner appealed and the court of appeals affirmed, observing that the district court gave petitioner ample opportunity to develop a feasible plan, and that "[t]he remedial phase of this litigation has now dragged on for eight years, producing few tangible results." *United States* v. *Yonkers Bd. of Educ.*, 29 F.3d 40, 42 (2d Cir. 1994), cert. denied, 515 U.S. 1157 (1995).

Petitioner "continued to fail to provide the new subsidized housing [that] the SLTPO contemplated." Pet. App. 6a. As a result, in November 1996, the district court entered a Second Supplemental Long Term Plan Order (Second SLTPO) that required petitioner to provide 100 units of affordable housing to LTPO qualified individuals each year for six years. *Id.* at 179a. In addition, the Second SLTPO ordered that existing housing units that are part of the affordable housing program be located in a community that "furthers the integrative purposes of the LTPO." *Id.* at 181a. The court reserved the right to "modify [the Second SLTPO] *sua sponte* or on request of any party at any time in the event that it shall be shown, after a hearing, that the goals set forth [in the order] have not been realized and are not likely to be realized in the foreseeable future, absent such modification." *Id.* at 185a; see *id.* at 7a.

In 1997 and 1998, the parties disputed the number of housing units for which petitioner was entitled to credit towards the Second SLTPO's goal of 100 units of subsidized housing per year. Pet. App. 7a. Respondents expressed concern that few Priority 1 households were benefitting from petitioner's housing program. *Id.* at 189a-214a. The district court asked the parties to propose a revision to the HRO "to increase the ability of priority 1 class members to have greater housing

opportunity" and "more carefully define what is meant by furthering the integrative purposes of the order." *Id.* at 218a, 223a. The court also ordered that any further affordable housing transactions be subject to review by the Department of Justice for "an evaluation of whether the transaction is consistent with the Court's prior orders and entails an appropriate expenditure of federal funds." *Id.* at 232a-233a.

In September 1999, the district court held another hearing on the status of petitioner's housing program. Pet. App. 372a. The court heard evidence on the number of Priority 1 households that have participated in the program, and the extent to which the targeted integration under the long-term plan has been achieved. *Id.* at 372a-408a. The court found that the program's "accomplishments to date fall far short," and ordered that "no future credits will be granted unless the housing opportunities created further the integrative goals which are the essence of all of the court's prior housing remedy orders, intending to counter the effects of prior racial discrimination in housing." *Id.* at 377a, 383a. The court further determined that "revisions" to the housing remedy were necessary to "accelerate both the volume and the direction and emphasis of future efforts." *Id.* at 377a.

2. In December 1999, the district court entered a Third Supplemental Long Term Plan Order (Third SLTPO). Pet. App. 23a-31a, 32a-33a. Pursuant to that order, the court granted petitioner nearly all the credits that it had requested in 1998 (Year 2). *Id.* at 26a. The court determined, however, that "no future credits will be granted unless housing opportunities created by the existing housing program further the racially integrative goals which are the essence of all the Court's prior housing remedy orders intended to counter the effects

of prior racial discrimination in housing in Yonkers." *Id.* at 27a. The court further ordered that future credits would be granted for the creation of affordable housing opportunities only as follows:

> (a) For Priority 1 households who move to census blocks in East and Northwest Yonkers which as of 1990 had a Black and Hispanic population which together totaled less than 45%;
>
> (b) For minority Priority 2 and 3 households who move to census blocks in East and Northwest Yonkers which as of 1990 had a Black and Hispanic population of less than 45%;
>
> (c) For non-minority Priority 2 and 3 households who move to census blocks in East and Northwest Yonkers which as of 1990 had a White population of less than 45%.

Id. at 28a. In addition, the court instituted a bonus system pursuant to which petitioner may receive enhanced credits for the placement of Priority 1 households. *Id.* at 28a-29a; see *id.* at 8a-9a.

3. The court of appeals affirmed. Pet. App. 1a-22a. Applying the framework established by this Court in *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the court of appeals rejected petitioner's argument that the district court improperly modified the Second SLTPO, finding that the adoption of the Third SLTPO was supported by a significant change in the factual conditions underlying the Second SLTPO, namely, the fact that the Second SLTPO was not working. Pet. App. 12a-13a. As the court explained, the "[Second] SLTPO was adopted to promote the implementation of the HRO and thereby to further the ultimate goal of remedying the City's past intentional

racial discrimination in its public and subsidized housing." *Id.* at 13a. And, the court concluded, by the time of the Third SLTPO, "it had become manifest that neither the intermediate nor the ultimate goal of the [Second] SLTPO was being achieved." *Ibid.*

To support that conclusion, the court of appeals reviewed the evidence presented to the district court showing that in Years 2 and 3 of petitioner's affordable housing program, few Priority 1 households were afforded housing opportunities. As the court recounted, "[i]n 1997, only 29% of * * * beneficiaries were priority one households, 68% were priority two, and 3% were priority three; and in 1998, only 7.9% were priority one, 85.4% were priority two, and 6.7% were priority three." Pet. App. 13a. In addition, the court reviewed the evidence showing that petitioner's actions under the Second SLTPO "were similarly inadequate in achieving the 'integrative goals which underlie the entire remedy order.'" *Ibid.*; see *id.* at 14a ("The[] data [presented to the district court] reveal that more than two years after its adoption, roughly half of those housing allocations made under the [Second] SLTPO whose effects on the racial segregation of Yonkers public housing are known remain non-integrative.").

The court of appeals also rejected petitioner's argument that, "by conditioning [petitioner's] receipt of credits for housing priority two and three families on the race of the families and on the racial makeup of the neighborhoods in which they are housed," the Third SLTPO "employs a race-conscious remedy in violation of the Equal Protection Clause." Pet. App. 15a. In considering that claim, the court stated that there is some question as to whether a court's consideration of race to remedy a finding of intentional racial discrimination triggers strict scrutiny. *Id.* at 15a-16a. But the

court concluded that it was unnecessary to "reach this question," because "the remedy embodied in the [Third] SLTPO clearly survives even strict scrutiny." *Id.* at 16a.

The court explained that to "pass strict scrutiny, a race-conscious remedy must be narrowly tailored to further a compelling government interest," and that the court reviews de novo "[a] district court's determination that a race-conscious remedy is narrowly tailored to advance a compelling government interest." Pet. App. 16a-17a & n.12 (citing *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995)). The court concluded that there was "no doubt" that the district court had a compelling interest for adopting a race-conscious remedy based on the "express[]" findings made in this litigation that "[petitioner] has engaged in intentional racial discrimination in its subsidized housing program." *Id.* at 17a (citing *Yonkers Bd. of Educ.*, 624 F. Supp. at 1288-1376). Thus, the court focused on "whether the district court's race-conscious remedy is narrowly tailored to further this unquestionably compelling interest." *Ibid.*

In determining whether the Third SLTPO's "race-conscious remedy is narrowly tailored to the ends it serves," the court considered the factors discussed in *United States* v. *Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion). Pet. App. 17a.[2] First, the court concluded that the "necessity of relief in the case at bar

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[2] In *Paradise*, a plurality observed that the Court "look[s] to several factors" in "determining whether race-conscious remedies are appropriate, * * * including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief * * *; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." 480 U.S. at 171; see Pet. App. 19a.

is patent." *Ibid.* As the court recounted, "[i]n spite of fifteen years of remedial efforts encompassing four race-neutral remedial regimes * * *, and at least partly because of the active and passive resistance to integration displayed by the City * * *, Yonkers public housing remains substantially segregated even today." *Id.* at 18a. Moreover, the court added, before adopting the challenged remedy, the district court "expressly" found that "the experience [of race neutral remedies] has not been satisfactory." *Ibid.* The court also observed that, as long as a district court stays "within appropriate constitutional or statutory limits," the court must be cognizant of the district court's superior vantage point, based on its "first-hand experience with the parties," to calibrate "the remedy best suited to curing" a constitutional violation. *Ibid.* (quoting *Yonkers Bd. of Educ.*, 837 F.2d at 1236, and *Paradise*, 480 U.S. at 184).

Second, the court concluded that the Third SLTPO "is both 'flexible' and 'ephemeral,'" in that the order "contemplates that the District Court will adjust the terms * * * as needed," and will "remain in force only until the discrete goals of the [Second] SLTPO and of the earlier remedial Orders in this case have been met." Pet. App. 18a-19a. Third, the court found that "the numerical goals and conditions for awarding [petitioner] housing credits adopted by the [Third] SLTPO are not disproportionate to the racial mix of Yonkers residents or the size of the Yonkers housing market." *Id.* at 19a. Fourth, the court determined that the Third SLTPO "does not unduly burden the rights of third

parties." *Ibid.* As the court explained, the order places no limit on the number of nonminority families that may move into subsidized housing in minority neighborhoods, and credits petitioner for creating housing opportunities in nonminority areas to any Priority 1 household regardless of race. *Id.* at 19a-20a.

Finally, the court "acknowledge[d] the respect owed a district court's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment." Pet. App. 20a (quoting *Paradise*, 480 U.S. at 183). In that regard, the court noted that the district court adopted the challenged remedy only after it had "carefully and patiently attempted to achieve this end by race-neutral means," "expressly determined that such means were not succeeding," and "hear[d] from both sides to the dispute." *Ibid.* Moreover, the court emphasized that the remedy that the court did adopt was "both temperate and responsible." *Ibid.*[3]

ARGUMENT

The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. The Third SLTPO is a limited attempt to redress the continuing effects of petitioner's past racial discrimination, and was adopted only after several race-neutral remedial plans proved ineffectual. The history of this litigation, including petitioner's repeated failure to comply with the prior remedial orders, makes this case a poor vehicle for addressing any of the broader

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[3] The court of appeals also rejected a cross-appeal by the NAACP challenging the portion of the district court's Third SLTPO that awarded petitioner bonus credits for achieving certain targets for placement of Priority 1 households into affordable housing, finding that the district court did not abuse its discretion in so modifying the Second SLTPO. Pet. App. 21a-22a.

complaints made by petitioner about the current state of the law.

1. Petitioner does not challenge the court of appeals' ruling that the district court acted within its discretion in modifying the long-term plan adopted by the Second SLTPO under the framework established by this Court in *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). Pet. App. 15a. Petitioner contends (Pet. 14-24), however, that the court did not adequately scrutinize the Third SLTPO in determining whether the adoption of a race-conscious remedy was warranted. That claim is without merit.

To begin with, petitioner fundamentally mischaracterizes (Pet. 16) the analysis engaged in by the court of appeals in reviewing the Third SLTPO, repeatedly stating that the court "deferred to the district court's exercise of equitable discretion." See also Pet. 15 ("[T]he Court of Appeals deferred to the district court's exercise of its 'sound discretion.'"), 16 (The court of appeals "deferred to the district court's exercise of equitable discretion."), 18 (The court of appeals "substantially deferred to the district court's unexplained decision that a race-based remedy was necessary."). As the court of appeals made clear, it undertook "*de novo*" review of the district court's determination that a race-conscious remedy was appropriate, and subjected that remedy to "strict scrutiny." Pet. App. 17a n.12. Furthermore, in applying strict scrutiny, the court of appeals followed this Court's recent decision in *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995). Pet. App. 9a, 15a, 16a-17a.

To be sure, the court of appeals also recognized that trial courts have broad authority to remedy constitutional violations, and to fashion and modify remedial decrees. Pet. App. 18a. That proposition is well-

founded. See, *e.g.*, *Freeman* v. *Pitts*, 503 U.S. 467, 487 (1992); see also *Spallone* v. *United States*, 493 U.S. 265, 276 (1990) (Federal courts have "inherent power to enforce compliance" with their lawful orders, and an order "is necessary to remedy past discrimination, the court has an additional basis for the exercise of broad equitable powers.") (internal quotation marks omitted); *Rufo*, 502 U.S. at 393-394 (O'Connor, J., concurring in the judgment). But, as petitioner neglects to mention, the court of appeals specifically recognized that that discretion must be exercised "'within appropriate constitutional or statutory limits.'" Pet. App. 18a. Accordingly, in determining whether the district court's adoption of a limited, race-conscious remedy in the Third SLTPO was appropriate, the court of appeals subjected the order to strict scrutiny. *Id.* at 16a-20a.

As the court below recognized, "[t]o pass strict scrutiny, a race-conscious remedy must be narrowly tailored to further a compelling government interest." Pet. App. 16a-17a (citing *Adarand*, 515 U.S. at 227). The court held that the Third SLTPO advanced a compelling government interest, because "[t]he district court expressly found that [petitioner] has engaged in intentional racial discrimination in its subsidized housing program," and the "Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *Id.* at 17a (internal quotation marks omitted); see *Adarand*, 515 U.S. at 227. That finding of past intentional racial discrimination is law of this case, Pet. App. 3a-4a; see also *United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1288-1376 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988), and petitioner "does not take issue with" it here. Pet. 21.

Petitioner contends (Pet. 20-24) that additional findings were necessary to justify the district court's adoption of a race-conscious remedy in the Third SLTPO. But, before adopting the Third SLTPO, the district court determined—after holding evidentiary hearings on the matter—that the prior intentional segregation has not been cured. Pet. App. 18a; see pp. 4-5, *supra*. Indeed, as the court of appeals observed, "[i]n spite of fifteen years of remedial efforts encompassing four race-neutral remedial regimes * * *, and at least partly because of the active and passive resistance to integration displayed by the City (and documented in both this and in our earlier opinions), Yonkers public housing remains substantially segregated even today." *Ibid.*

Furthermore, a necessary predicate for the district court's modification of the Second SLTPO—which petitioner does not challenge here—was a determination that that remedial plan had failed to achieve the goal of integrating racially segregated public housing in Yonkers or eliminating the continuing effects of petitioner's past discrimination. See Pet. App. 13a ("[B]y the time of the modification * * *, it had become manifest that neither the intermediate nor the ultimate goal of the [Second] SLTPO was being achieved."). More fundamentally, the district court adopted the Third SLTPO against the backdrop of the many previous findings in this case of intentional racial discrimination and of the continuing harm or segregation persisting from that discrimination. See Gov't C.A. Br. 18-20, 26 (discussing some of those findings). Those findings remain law of the case.[4]

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[4] Petitioner contends (Pet. 20-21) that the Second Circuit's decision in this case conflicts with *Schurr* v. *Resorts International*

2. Petitioner asserts (Pet. 24-27) that the district court lacked any justification for adopting a race-conscious remedy. As the court of appeals explained, however, the district court adopted the Third SLTPO only after "carefully and patiently" attempting to remedy petitioner's past intentional racial discrimination through "race-neutral means," and "having expressly determined that such means were not succeeding." Pet. App. 20a. The record overwhelmingly supports that conclusion.

The prior remedial orders entered in this case were adopted for the express purpose of "counter[ing] the effects of prior racial discrimination in housing in Yonkers." Pet. App. 27a. The HRO enjoins petitioner from "intentionally promoting racial residential segregation in Yonkers," and created an affordable housing trust fund to support and create housing opportunities to advance integration. *Id.* at 98a, 109a-110a. Racial integration was the principal goal of the LTPO, which provides that the first priority for subsidized housing opportunities outside of predominantly minority southwest Yonkers should be given to individuals who live or

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Hotel, 196 F.3d 486 (3d Cir. 1999), and *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525 (11th Cir. 1994), cert. denied, 514 U.S. 1065 (1995), insofar as the court of appeals did not require the district court to make additional factual findings. Neither of those cases, however, involved a district court's adoption of a race-conscious remedy as part of its modification of an existing remedial order in a case, such as this one, in which extensive findings of past discrimination and of the failure to redress such discrimination had been made by the same trial court, and become law of the case. *Schurr* considered whether an employer's "affirmative action program" violated Title VII, 196 F.3d at 496; *Birmingham* involved whether an "affirmative action plan" was supported by adequate findings of "past discrimination," 20 F.3d at 1549.

have lived in public housing in the City. *Id.* at 140a. In addition, racial integration was the objective of the Second SLTPO, which states that housing units selected under the affordable housing program must "further[] the integrative purposes of the LTPO." *Id.* at 181a. See Gov't C.A. Br. 23-24.

Before adopting the Third SLTPO, the district court determined that petitioner's housing program was not achieving integration. The district court heard evidence that petitioner's affordable housing program was not benefitting Priority 1 households. During 1997, only 29% of housing placements under petitioner's program involved Priority 1 households, and by 1998 that percentage declined to 7.9%. Pet. App. 13a-14a. Other evidence showed that moves made during Years 2 and 3 of petitioner's program were not achieving the integrative goals of the remedial scheme. Half of the total moves that occurred under petitioner's program during those years consisted of nonminority families moving to predominantly nonminority communities, and of minority families moving to predominantly minority communities. *Ibid.*

The district court went to great lengths to use race-neutral means to remedy the segregation in subsidized housing caused by petitioner's past racial discrimination. The race-conscious provision of the Third SLTPO was adopted only after more than 15 years of failed race-neutral efforts. Pet. App. 18a; see Gov't C.A. Br. 26, 29-30 (discussing evidence showing that petitioner's implementation of the prior remedial plan was not effective).

The Third SLTPO's use of race was also carefully tailored to remedying the continuing effects of petitioner's past discrimination. The evidence showed that southwest Yonkers and the Runyon Heights section of

east Yonkers continue to be overwhelmingly populated by black and Hispanic residents. As the district court found, the segregated conditions in those areas were caused largely by petitioner's unconstitutional efforts to confine housing to those areas. In seeking to redress that segregation, the district court properly required petitioner to enhance its efforts to afford housing opportunities to Priority 1 households—families who resided in public and subsidized housing at the time of petitioner's discriminatory actions, and who are overwhelmingly minority. See Gov't C.A. Br. 32.

3. Petitioner suggests (Pet. 27) that the race-conscious remedy adopted by the Third SLTPO is "extreme." That is incorrect. The race-conscious provision of the Third SLTPO establishes the criteria pursuant to which petitioner may receive "future housing credits" toward compliance with the remedial plan. Pet. App. 8a. As the court of appeals explained, the Third SLTPO, including the challenged provision, is by its terms both "flexible" and "ephemeral" in nature. *Id.* at 18a. The order "contemplates that the District Court will adjust the terms of the Order as needed," and that the order "will remain in force only until the discrete goals of the [Second] SLTPO and of the earlier remedial Orders in this case have been met." *Id.* at 18a-19a.

Contrary to petitioner's contention (Pet. 29), the Third SLTPO does not preclude participation by nonminority families in petitioner's housing program. Nonminority families who are Priority 1 households may participate in that program, and petitioner may receive LTPO credit for placing those families in subsidized housing. Nonminority families that qualify as Priority 2 or 3 households may also participate in petitioner's program, and petitioner may receive credit for

that participation when the moves further integration and result in nonminority families moving into predominantly minority neighborhoods. No qualified family, regardless of race, is prevented from participating in petitioner's housing program, and nothing precludes petitioner from providing subsidized housing opportunities to families whose moves do not further integration. The order merely withholds LTPO credit for moves that do not redress the lingering effect of petitioner's past discrimination. Pet. App. 19a-20a; see Gov't C.A. Br. 33-34.

4. Petitioner's broad complaints about the current state of the law do not merit review. Petitioner claims (Pet. 17) that "further guidance" is needed in "explaining how a lower court should strictly scrutinize a racial remedy," and suggests that the level of scrutiny employed by the court of appeals below is at odds with the approach undertaken by other courts of appeals. That claim is based on petitioner's assertion (*ibid.*) that the Second Circuit held "that the assessment of the necessity for racial relief is a matter left to the 'sound discretion' of the district court." However, that is not the holding of the court of appeals. As explained above, the court below engaged in a "*de novo*" review of whether the "race-conscious remedy [adopted by the Third SLTPO] is narrowly tailored to advance a compelling government interest," and concluded that "the remedy embodied in the [Third] SLTPO clearly survives even strict scrutiny." Pet. App. 16a, 17a n.12. Neither the court of appeals' statement of the strict scrutiny analysis, nor its fact-bound application of that analysis, warrants further review in this case.

Petitioner cites other courts of appeals' decisions for the proposition that race-conscious remedies may only survive strict scrutiny when they are adopted as a "last

resort." Pet. 17 (citing *Engineering Contractors Ass'n* v. *Metropolitan Dade County*, 122 F.3d 895, 927 (11th Cir. 1997), cert. denied, 523 U.S. 1004 (1998); *Alexander* v. *Estepp*, 95 F.3d 312 (4th Cir. 1996), cert. denied, 520 U.S. 1165 (1997); *Hayes* v. *North State Law Enforcement Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993)). This case embodies, rather than conflicts with, that remedial principle. The district court adopted the race-conscious element of the Third SLTPO only after it determined that "fifteen years of remedial efforts encompassing four race-neutral remedial regimes" had failed to redress the underlying constitutional violation. Pet. App. 18a.

In any event, given the unique circumstances of this case—including the district court's repeated attempts to implement race-neutral remedies, and petitioner's repeated resistance to the implementation of those remedies—this case would be a poor vehicle for addressing any of the broader doctrinal issues that petitioner seeks to raise here.[5]

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[5] Petitioner claims (Pet. 24, 27) that the "*Paradise* factors are too vague to provide sufficient guideposts in constructing a racial remedy," and that "further explanation of the *Paradise* factors by this Court is necessary to assist lower courts in assessing a racial remedy." But petitioner does not point to any conflict in the lower courts warranting this Court's review with respect to the consideration of the *Paradise* factors in this case. Moreover, in the court of appeals, petitioner itself argued that the *Paradise* factors are "generally accepted," and urged the court to consider those factors in determining whether the Third SLTPO meets the "narrowly tailored" requirement. Pet. C.A. Br. 52; see also *ibid.* ("Although originally applied to employment-based affirmative action, this test [*i.e.*, the *Paradise* factors] has been consistently applied in assessing whether a remedy is narrowly tailored."). Petitioner has not argued that this case should be held for *Adarand Constructors, Inc.* v. *Mineta*, cert. granted, No. 00-730

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2001

(Mar. 26, 2001). But in any event, we do not believe that course would be appropriate. The question presented in *Adarand* involves the application of the strict scrutiny standard to a statutory and regulatory program, and not to the type of remedial order challenged in this case, which was adopted only following a judicial finding of intentional racial discrimination, and following several failed efforts to address the continuing effects of that discrimination through race-neutral means.

(6)

Supreme Court, U.S.
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No. 00-1497

IN THE

Supreme Court of the United States

CITY OF YONKERS,

Petitioner,

v.

UNITED STATES AND YONKERS BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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REPLY ARGUMENT

In the Brief for the United States in Opposition, the Acting Solicitor General[1] claims that this case is ". . . a poor vehicle for addressing any of the broader complaints made by petitioner about the current state of the law." U.S. br. at 10, 11, 18. With that single statement, the government brushes aside the important issues raised by Yonkers addressing the circumstances in which a district court may impose a race-based remedy. The Acting Solicitor General claims this case is a "poor vehicle" because of "petitioner's repeated failure to comply with the prior remedial orders." U.S. br. at 10. But, the district court never made such a finding to support entry of the racial classification. Nor does the government point to anything in the trial court record demonstrating that the City resisted implementation of a program that it fought so hard for in the negotiation of the 1996 order. The record below simply does not support the government's naked assertion.

The district court entered the order below because it was not satisfied with the result that some beneficiaries of the City's housing program were white, not because of some "failure [by Yonkers] to comply with prior remedial orders." As Yonkers acknowledges in its petition, it did fail to comply with earlier remedial orders in the late 1980's. Pet. at 21. As a result, it lost control over the remedy to court-appointed agents and suffered a damaging contempt proceeding.

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1. The U.S. Brief was filed by the Acting Solicitor General (together with the Acting Assistant Attorney General for Civil Rights) on May 29, 2001, some five days after Theodore Olson was confirmed by the Senate as Solicitor General. Unfortunately, this Court does not have the benefit of the views of the President's duly-appointed Solicitor General.

Pet. at 5, 6. Yonkers has moved beyond that and in 1996 the district court correctly returned control over the remedy to the City. The record below conclusively demonstrates how the City aggressively addressed the opportunity to effectuate a remedy so that this unfortunate chapter in its history could be closed. The undisputed facts demonstrate that Yonkers facilitated hundreds of units of affordable housing in the target neighborhoods — over 70% of which were occupied by minority families. Pet. at 8.

The real issue is whether *any* non-minority families may receive benefits flowing from a remedy that employs race-neutral selection criteria. The NAACP urged the district court to adopt a strict racial exclusion — effectively a 100% quota for minorities. Unlike the government, the NAACP forthrightly defends the position that it has consistently taken in the courts below — that because fifteen years ago Yonkers was found to have discriminated against blacks, "race-conscious remedies are not merely preferred — they are required." *See* NAACP br. at 4, 5. What the NAACP fails to acknowledge, however, is that the order it obtained does not benefit Priority 2 and 3 minority families that are identified victims of past discrimination, it simply prefers Priority 2 and 3 minority families solely on the basis of their race. If that is a legitimate goal, then it is correct that the original plan did not work. It is unlikely that a race-neutral program will ever achieve 100% minority participation. As urged by *amicus curiae* Center for Individual Rights, such a goal of outright racial balancing is beyond the authority of a federal court.

Contrary to the government's claim, this case presents a unique opportunity for this Court to address the circumstances in which a federal court may impose a racial

remedy. It also provides a vehicle for assessing the narrow tailoring prong of strict scrutiny. We believe it could serve as a companion case to *Adarand Constructors, Inc. v. Mineta*, *cert. granted*, No. 00-730 (March 26, 2001), which addresses a legislatively-approved racial classification.[2] This case not only raises the important question of a district court's authority to require race-based governmental conduct to racially balance local neighborhoods, but also the extent to which such conduct must be tailored to a lawful and compelling governmental interest.

CONCLUSION

Petitioner City of Yonkers requests that this Court grant its petition for writ of certiorari and vacate the judgments of the lower courts.

Respectfully submitted,

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2. While Yonkers respectfully urges this Court to grant certiorari and hear this case together with *Adarand*, should the Court decline that opportunity, this case should certainly be held and re-assessed after *Adarand* is decided.

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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4 pp

Pursuant to Supreme Court Rule 15(8), petitioner City of Yonkers files this supplemental brief in support of its pending petition for a writ of certiorari. Yonkers seeks to bring to the Court's attention the recent decision of the Court of Appeals for the Eleventh Circuit in *Johnson v. Board of Regents of the University of Georgia*, Nos. 00-14340 and 00-14382, __ F.3d __, 2001 U.S. App. LEXIS 19154 (11th Cir. August 27, 2001). Yonkers contends that the Eleventh Circuit's decision in *Johnson* conflicts with the decision of the Second Circuit that is the subject of its petition.

In its petition, Yonkers demonstrated that the Second Circuit's decision improperly applied the narrow-tailoring prong of constitutional strict scrutiny analysis and approved a remedy that was beyond the district court's remedial authority. Specifically, Yonkers contends that the Second Circuit failed to engage in a "thorough and complete analysis" of a racial classification to ensure that such a remedy is only used as a "last resort." Pet., 14-18. Yonkers urged that further explanation of the level of inquiry and elaboration of the *Paradise* factors is necessary to provide direction to lower courts on the proper application of strict scrutiny to a racial classification. Pet. 24-29.

In *Johnson*, the Eleventh Circuit made clear that the narrow tailoring requirement of strict scrutiny requires an inquiry that is "intrusive, and focused very closely and in a very precise way on the specific terms of the regulations or policy under review . . ." Slip op., 36. The *Johnson* court recognized that the *Paradise* factors are only guidelines and require adjustment based on the nature of the racial classification under review. Slip op., 38-40. Indeed, the Eleventh Circuit noted it does ". . . not view these factors as determinative in all instances, but they do provide a useful analytical structure . . ." *Johnson*, slip op., 40.

The Eleventh Circuit applied the *Paradise* factors, as modified to fit the context of public university admissions, in a very thorough and searching manner to the factual record to determine that the challenged policy used race in an inflexible and arbitrary manner that was fatal to the policy's constitutionality. Slip op., 44-50.

The Eleventh Circuit's thorough and searching scrutiny of the racial classification at issue in *Johnson* stands in marked contrast to the Second Circuit's deferential review of the racial classification at issue in *Yonkers*. *See* pet. at 18, 27-29. Review by this Court would resolve this stark difference in approach and would assist lower courts in understanding the searching and thorough review necessary to ensure that, in those rare instances when constitutionally permissible, a governmentally-imposed racial classification is appropriately tailored to further a compelling interest. As demonstrated in its petition, Yonkers contends that the racial classification imposed here unlawfully requires Yonkers to attain a goal of racial balancing of local neighborhood housing patterns.[1]

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1. Petitioner also notes that subsequent to the Court's conference of this case on June 28, 2001, the Solicitor General filed the merits brief for the respondents in *Adarand Constructors v. Mineta*, No. 00-730, wherein the Solicitor General claimed the Court should not reach the "serious constitutional issues raised by petitioner" due to issues of standing and mootness. On that basis, the government claimed that *Adarand* is an "abstract vehicle" to address the substantive questions before the Court. Those concerns further demonstrate how *Yonkers* provides a clear and uncomplicated opportunity for this Court to squarely address the constitutional issues that are of national importance in these cases.

Respectfully submitted,

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